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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. .....

BOYD R. RINGHISER,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINIONS BY COURTS BELOW.*

Petitioner, Boyd R. Ringhiser, respectfully prays that a writ of certiorari issue to the United States Court of Ap-

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* Reference in this petition to "App. —a" is to the page number in the appendix of plaintiff-appellant in the Court of Appeals, which is part of the certified record. Reference to "App. A—, B—, and C—" is to the page number of the appendices to this petition.

peals for the Sixth Circuit to review the judgment and decision of that court in Case No. 12898, entitled Boyd R. Ringhiser v. The Chesapeake & Ohio Railway Company, which court in a per curiam opinion and judgment filed December 19, 1956 (App., C, 49) affirmed the judgment of the United States District Court for the Southern District of Ohio. The District Court entered judgment for respondent notwithstanding the previously entered verdict and judgment for petitioner, and the unreported decision of the District Court is appended to this petition (App., A, 24).

JURISDICTION OF THIS COURT.

The entry of the judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought, was dated December 19, 1956 (App., C, 49).

Jurisdiction of this Court to review the said judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is conferred upon this Court by the provisions of the Act June 25, 1948, c. 646, 62 Stat., 928; U.S.C. Title 28, Section 1254(1), which provides:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

QUESTIONS PRESENTED FOR REVIEW.

1. In an action under the Federal Employers' Liability Act where the jury has found for the employee on issues of negligence and causation under instructions from the court repeatedly emphasizing the requirements of foreseeability and proximate cause, may the court then set aside those findings by the jury by substituting its own judgment on the issues of foreseeability and proximate cause as a basis

for granting the railroad's motion for judgment notwithstanding the verdict?

2. In an action under the Federal Employers' Liability Act where the court has instructed the jury that in order to find for the employee it must find that the railroad "would have to have reasonably anticipated and foreseen that the probable result of not having enough toilets would be that this employee or some employee would be caught in an emergency and not be able to get to a toilet and have to use a car, as was done here, and that switching operations might occur as they did in this case and injure him", and the jury pursuant to that instruction found in favor of the employee, may the court then set aside that finding of the jury upon the ground that in the court's opinion the sequence of events set forth in the court's own charge, which in fact did result from the lack of toilet facilities, was not reasonably foreseeable?

3. In an action under the Federal Employers' Liability Act may the court set aside jury findings in favor of the employee on the issues of negligence and causation by applying to the record the test that the precise sequence of events and the result in this particular case must, in the judgment of the court, be a foreseeable consequence of the failure or acts charged against the railroad?

4. In this action under the Federal Employers' Liability Act did the court in testing the general verdict for petitioner confine itself to the proper judicial inquiry of whether the evidence justified with reason the conclusion that respondent's negligence played any part, even the slightest, in producing the injuries to petitioner?

5. In testing the general verdict for petitioner under the Federal Employers' Liability Act, was the court correct in separating each ground for recovery and isolating the evidence with respect thereto?

STATUTES INVOLVED.

The questions presented for review in this petition involve the provisions of the Act of Congress, known as the Federal Employers' Liability Act. Title 45, U.S.C., Sections 51 and following. Section one of the Act, Title 45, U.S.C., Section 51, provides:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee; for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65; August 11, 1939, c. 685, Sect. 1, 53 Stat., 1404."

STATEMENT OF THE CASE.

Petitioner filed this action in the United States District Court for the Southern District of Ohio under the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following, to recover damages for injuries necessitating the amputation of his right leg between the knee and ankle. At the close of the trial the jury returned a verdict for $40,000 and judgment was entered for that amount in favor of petitioner against respondent. Subsequently respondent's motion for judgment notwithstanding the verdict was sustained by the trial court and judgment for respondent was entered. The United States Court of Appeals for the Sixth Circuit affirmed that judgment in a per curiam opinion adopting the reasoning of the District Court (App. C, 49).

At the trial much of the evidence was uncontroverted. The respondent maintained a large yard known as Parsons Yard in Columbus, Ohio, where many railroad trains were received and dispatched (App. 92a). In this yard there were a large number of tracks, considerable equipment and many facilities, and many employees worked there in connection with the trains and switching (App. 77a, 78a). The tracks in this yard extended in cardinal directions generally north and south although in the record reference is frequently made to the equivalent railroad directions of west and east.

On the date of the accident petitioner, a locomotive engineer of respondent, reported for duty at the terminal building in the above yard (App. 11a). He then went to the roundhouse completing preliminary paper work (App. 11a), boarded the assigned locomotive and drove it over various tracks a considerable distance where it was coupled

onto a train on track No. 12 or the ready track (App. 13a, 14a). The train was scheduled to make a run to Walbridge, Ohio, but first an air inspection test was required (App., 14a).

The standing locomotive was in the central part of an area in the north part of the yard containing a large number of tracks and was located about 80 feet from a switchmen's shanty (App. 22a, 24a). The switchmen's shanty in this area was the center of activity for a large number and a variety of respondent's employees, eighty or more in a 24-hour period (App. 74a-77a). At or in the vicinity of that shanty, moreover, train crews customarily boarded or departed from road locomotives (App. 96a); consequently it was a common occurrence for an engineer such as petitioner, as well as other crew members, to be stationed in that area in or around a standing locomotive. No toilet was provided in this building and no toilet was provided in this central location (App. 74a). Likewise, there was no toilet in the locomotive (App. 93a). The nearest toilet was approximately 217 feet from the location of the locomotive (App. 23a, 24a). In the entire north end of this yard five toilets were located, respectively, approximately 940 feet, 785 feet, 740 feet, 385 feet and 217 feet from the locomotive. With the exception of the toilet located 385 feet away, all the toilets were located to the west of the various tracks in the north end of the yard (App. 79a). Petitioner was separated from these toilets by several intervening tracks which were continually occupied by incoming and departing trains, switching movements and storage of railroad cars (App. 20a, 21a, 77a-79a). The toilet that was located 385 feet away was upset and not usable (App. 35a). From his position on the locomotive

petitioner had easy access to the switchmen's shanty and so did the 80 or more other employees working daily around the shanty (App. 76a, 77a).

Prior to this accident it was common practice for employees to relieve themselves in railroad cars in the general vicinity of the standing locomotive and the shanty (App. 30a, 64a, 84a).

There was a similar area in the south end of the respondent's yard approximately a mile and a half from where petitioner was injured and in the center of this area in the south end the respondent likewise had maintained a switchmen's shanty (App. 99a) used similarly as the shanty in the north end of the yard (App. 100a). The shanty in the southern part of the yard was equipped with a toilet (App. 97a).

After waiting for the air inspectors for perhaps an hour (App. 14a), petitioner felt an urgent call of nature. Petitioner's access to all usable toilets was not only obstructed by the intervening tracks, but was blocked by a long incoming train of respondent of approximately 160 cars (App. 17a, 79a). Petitioner realized from past experience that this train would occupy the track for ten or fifteen minutes and that other movements might be made after the train had passed (App. 79a). He quickly went to an open gondola car which had been placed on storage tracks to the east of his engine in an area where he had observed no switching (App. 61a, 62a). He relieved himself in that car (App. 17a). At that time a switching crew of respondent caused two railroad cars to be switched onto the track occupied by the gondola car and these cars struck an intervening boxcar and knocked the boxcar and the gondola car occupied by petitioner a distance of 25 feet (App.

107a). The force of the impact caused unsecured bars of steel in the gondola car to shift and one of these bars pinched and crushed petitioner's right leg against the end of the car (App. 53a). As a result the petitioner's leg had to be amputated below the knee (App. 29a).

The respondent's rule prohibited employees from crossing between moving railroad cars (App. 63a, 64a), and respondent also had a rule that railroad cars should be handled so as not to cause any damage to the company's property (App. 83a).

Because of the importance of the trial court's instructions in the consideration of the questions presented in this petition, the transcript of those instructions and the proceedings in the course of the charge is appended (App. B, 36).

Throughout the charge the trial court carefully and repeatedly stressed that as a prerequisite of a finding for petitioner the jury must make a finding of proximate cause or reasonable anticipation. In every instance where the trial court submitted or discussed a possible ground of negligence, the court emphasized that the jury could not find for petitioner unless it found that the failure or act charged was the proximate cause of petitioner's injuries and that the result in this case could or should have been reasonably anticipated by respondent from the failure or act charged (App B, 39, 40, 41, 46, 47, 48).

Even further, the court instructed the jury that a finding for petitioner required a finding by the jury that the respondent could or should have reasonably anticipated or foreseen the *series of events* or circumstances that led to the result in this particular case (App. B, 39, 40, 47). The latter instruction in this regard is particularly significant, since it was given by the court in response to a request

by the foreman of the jury after the jury had retired to deliberate and had returned for further instructions. The court replied in part (App. B, 47):

> "I can elucidate a little further. In other words, if the defendant were negligent in not having enough toilets in order for the plaintiff to recover here, the defendant through its employees would have to anticipate that from the failure to have sufficient toilets, that is, they would have to have reasonably anticipated and foreseen that the probable result of not having enough toilets would be that this employee or some employee would be caught in an emergency and not be able to get to a toilet and have to use a car, as was done here, and that switching operations might occur as they did in this case and injure him."

Then in response to a further question the court's final words to the jury were these (App. B, 48):

> "And coupled with the question of whether or not it was negligent, you must determine, you must apply also the rule which I have given you with reference to proximate cause, that is, could they have foreseen that the failure to have toilets would lead to this result."

Under those instructions the jury returned a general verdict for petitioner and judgment was entered for petitioner for $40,000.00 and costs on November 23, 1955.

Subsequently the trial court granted respondent's motion for judgment and overruled respondent's motion for new trial. The basis for such action is found in the court's decision (App. A, 24), and the grounds for granting such judgment can best be found in the trial court's own statements:

> "The sequence of events and the result therefrom in this case are so extraordinary that to expect the defendant to have anticipated and foreseen such a consequence of not having an additional toilet at the switchman's shanty, or any additional toilets, would have been to expect the miraculous." (App A, 27)

"Again, the question of foreseeability arises. Could the defendant have reasonably foreseen or anticipated that placing a loaded car in such a place and that the normal switching of cars on to the same track in the operation of its business would produce such a result?

"Even though the defendant had some knowledge that employees sometimes used gondola cars for the purpose of relieving themselves, it could not be required to inspect each car before coupling another car on to it. It had no duty to anticipate that a car was being used for such a purpose." (App. A, 28)

The Court of Appeals, as we have stated, affirmed the judgment and adopted the reasoning of the District Court.

ARGUMENT.

Summary.

The District Court repeatedly instructed the jury that a finding of negligence was not enough to warrant a verdict for plaintiff; the jury must also find that from the negligent act or failure the respondent should have reasonably anticipated not only the result of this case but the series of events leading to that result. The jury made that finding in favor of petitioner. The court then set aside the jury's finding upon the court's conclusion that the result and the series of events leading to that result could not have been reasonably anticipated by respondent. A judgment for petitioner based upon a verdict and finding by the jury was thereby transformed into a judgment for respondent by means of substituting the court's contrary opinion for the finding of the jury upon the same issues of proximate cause and foreseeability which the court had submitted to the jury. There is no question but that the failure (lack of toilets) did *in fact* lead to the result, that is, petitioner's injury. The same is true of the switching operation and the shifting of the load in the car. The court's decision then could only be, and was, based upon the court's own judgment as to whether that result and the events leading to that result could have been reasonably foreseen.

First, where the act or failure did in fact produce in part the injury to petitioner, the court must not substitute its judgment as to foreseeability and causation for that of the jury. In doing so, the court clearly violated the basic principle in *Lavender v. Kurn*, 327 U. S., 645; *Wilkerson v. McCarthy*, 336 U. S., 53; *Schulz v. Pa. R. Co.*, 350 U. S., 523; and the reemphasis of that principle in the recent decisions in *Rogers v. Missouri Pacific R. Co.*, — U. S., —;

Webb v. Illinois Central R. Co., — U. S., —; and *Ferguson v. Moore-McCormack Lines, Inc.*, — U. S., — (Nos. 28, 42 and 59, Oct. Term, 1956, Opinions, February 25, 1957).

Secondly, the court may not in any event set aside a jury finding of negligence and causation upon the ground that the series of events, as they occurred in this case and led to the resulting injury, were not, in the opinion of the court, reasonably foreseeable from the act or failure charged. The validity of such a judicial test is doubtful under even the strict common law doctrine, but it is certainly a violation of the statutory test under the Federal Employers' Liability Act. This was a serious error in direct conflict with the explicit holding and statement by this Court in the recent case of *Ferguson v. Moore-McCormack Lines, Inc.*, — U. S., — (No. 59, Oct. Term, 1956, Opinion, Feb. 25, 1957).

Thirdly, the statutory test of a jury finding of negligence and causation under the Act, as reaffirmed by this Court in the case of *Rogers v. Missouri Pacific Co.*, — U. S., —, was patently ignored by the court in this case. Had the court simply inquired whether the evidence justified with reason the conclusion that negligence of respondent played any part, even the slightest, in producing petitioner's injury, the matter would have been at an end. The court, on the contrary, after paying lip service to the statute at the outset of its charge then proceeded to ignore the Act and this Court's decisions and judgments as well. The trial court's decision was frankly patterned on what the court called the common law concept of negligence and proximate cause. Whatever the court chose to call that concept, it was far removed from the statutory test laid down by this Court—even to the extent of quoting and gaining support from a dissenting opinion in this Court

and from circuit court opinions in decisions which were subsequently reversed in this Court.

Finally, the court in its decision considered each ground for recovery piecemeal and did not give any credence to the over-all pattern of the evidence. This was, of course, a repudiation of a long-standing principle aptly stated in *Union Pacific R. Co. v. Hadley*, 246 U. S., 330, and often applied by this Court and others in subsequent decisions. *Blair v. B. & O. R. Co.*, 323 U. S., 600; *Bailey v. Central Vermont Ry. Co.*, 319 U. S., 350. The error in this respect was particularly serious, since the jury's verdict was a general one; and it should have been tested by an appraisal of all the evidence as a whole. Instead the court considered only two hypotheses, lack of toilets and switching, each separately, as if one could have no possible bearing upon or connection with the other. Many significant items of evidence were either ignored or dismissed as having no weight. This weighing and choosing of facts, emphasizing some and ignoring or dismissing others, constituted an invasion by the court of the very core of the jury's function. The court, for example, refused to give any weight at all to the significant items of the impact of the switching and the violent shifting of the unsecured load of steel; yet placed great import upon the fact that the petitioner started the morning with a dose of salts.

It would be difficult to find a more fundamental departure from the congressional intention than that of the trial court in this case. This Court has recently affirmed its "obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction." *Rogers v. Missouri Pacific R. Co.*, — U. S., —. That obligation, we submit, is even more impelling in this case, for the lower courts

have utterly failed to abide by the Congressional Act or the interpretations of that Act by this Court.

Questions 1 and 2.

In the early part of its charge the trial court emphasized to the jury that respondent was not liable unless it could or should have anticipated that a failure to have toilets would lead to the events that actually occurred and the resulting injury to petitioner (App. B, 39, 40). This requirement, as we have stated, was repeatedly emphasized and significantly so in response to the jury's request for additional instructions after it had retired to deliberate and then returned to the courtroom for further instructions (App. B, 47). The subsequent general verdict for petitioner, accordingly, was a finding that respondent could or should have anticipated such events and the resulting injury of petitioner. Yet the court in granting respondent's motion for judgment notwithstanding the verdict set aside that finding and substituted the court's own opinion to the effect that "the sequence of events and the result therefrom in this case" could not have been reasonably anticipated by respondent (App. A, 27).

The court, therefore, denied the jury the right to make a finding on foreseeability and cause, although the court's contrary opinion was predicated upon the identical elements contained in its charge to the jury. The court thereby deprived petitioner of the benefit of the jury's findings on issues of negligence and causation where the record shows that without question the failure to have toilets, the switching operation and the shifting load of steel in the gondola car did *in fact* result in petitioner's injury. The court, therefore, based its decision not upon a lack of factual evidence on causation, but upon its own

judgment as to whether the result and the events leading up to that result were foreseeable. Here is a striking violation of the principle announced and applied by this Court that issues of negligence and causation are for the jury where the finding is in fact supported by any probative evidence. *Lavender v. Kurn*, 327 U. S., 645; *Schulz, Admx., v. Penn. R. Co.*, 350 U. S., 523. That principle was restated and reaffirmed, moreover, in three recent decisions of this Court on February 25, 1957. *Rogers v. Missouri Pacific R. Co.*, — U. S., —; *Webb v. Illinois Central R. Co.*, — U. S., —; *Ferguson v. Moore-McCormack Lines, Inc.*, — U. S., —.

The inconsistency of the court's reasoning is apparent in its decision (App. A, 24). On the one hand, the court in granting respondent's motion for judgment held in effect that the jury could not find as it did under the court's own instructions on proximate cause and foreseeability; on the other hand, in overruling respondent's motion for new trial the court vigorously defended and upheld the validity of those same charges (App. A, 34-36).

Question 3.

Irrespective of the record, the court in an action under the Federal Employers' Liability Act may not test a general jury finding of negligence and causation by requiring that the sequence of events of the particular case and the injury therefrom be, in the opinion of the court, reasonably foreseeable as a consequence of the act or failure charged. That is precisely the judicial test which was condemned by this Court in the recent case of *Ferguson v. Moore-McCormack Lines, Inc.*, — U. S., —, wherein this Court stated:

> "It was not necessary that respondent be in a position to foresee the exact chain of events which actually led to the accident."

Indeed it is questionable that such a judicial test of proximate cause is the proper one in any negligence action. The sound general principle is stated in 22 *Ruling Case Law*, 126:

> "Where there is danger of a particular injury which actually occurs, we must surely say that it is the usual, ordinary, natural and probable result of the act exposing the person or thing injured to danger. The result seems to be that, when the act complained of was such that, in view of all the circumstances, it might not improbably cause damage of some kind, the doer of the act cannot shelter himself under the defense that the actual consequence was one which rarely follows that particular act. To hold so would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such a manner there could be no recovery, but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable."

In any event the test applied by the court was clearly erroneous under the statute and the decisions of this Court. In the recent decision of *Rogers v. Missouri-Pacific R. Co.*, — U. S., —, this Court specifically condemned a concept of "proximate cause which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury."

That the jury's general finding on foreseeability and causation was sound can be shown by factual situations in a multitude of other cases where the court held that the test of foreseeability had been met. In addition to the case of *Ferguson v. Moore-McCormack Lines, Inc.*, — U. S., —, the following cases are illustrative:

Lillie v. Thompson, 332 U. S., 459 (injury to an employee resulting from an intentional and criminal assault by a

third party held to be a foreseeable danger from working in an isolated shanty); *O'Day v. Chicago R. & I. R. Co.*, 216. Fed. 2d, 79 (a scuffle with a third party and the resulting fall by the employee held to be a foreseeable result in part from a depression in the area around the railroad's switch); *Mostyn v. Delaware L. & W. R. Co.*, 160 Fed. 2d, 15 (track worker's injury while sleeping on a track when struck by an engine held to be a foreseeable result of a verminous bunk car where he regularly slept); *Glime v. New York Central R. Co.*, 126 N. E. 2d, 385 (injury to workman while going between cars of a moving train held to be caused in part by a negligent failure to furnish a safe place to work based upon the general character and layout of the facilities and track in the railroad's yard); *Bonnier v. Chicago B. & Q. R. Co.*, 119 N. E. 2d, 254, certiorari denied, 348 U. S., 830 (injury to an employee who was stealing metal from a car where he obviously should not have been, held to be a foreseeable result in part from negligence in switching unattached cars against that cut containing the car in which the employee was located).

The contrast between the above cases and the instant one is obvious. Here the respondent could well anticipate that petitioner or some other employee in the same area would relieve himself in a car since that was a practice in that area due to the fact that there were no accessible toilets in that area. In the foregoing decisions the defendant railroad certainly had less reason or basis to anticipate, respectively, a criminal assault upon an employee, a fight between an employee and a stranger at the precise spot in the roadbed where there was a depression, an employee asleep on its track, a workman who in violation of a rule climbed between cars of a moving train, and even the presence of a thief on one of its cars! Yet those

decisions upheld liability in each case by applying the simple and plain provision of the statute that negligence need cause only "in part" the injury. A fortiori, the same conclusion should have been reached in this case.

Question 4.

This Court has recently reaffirmed and reemphasized the foregoing simple statutory test of a jury finding under the Federal Employers' Liability Act. That test is: Does the evidence justify with reason the conclusion that railroad negligence played any part, even the slightest, in producing the injury for which damages are sought. *Rogers v. Missouri Pacific R. Co.*, — U. S., —. It is clear beyond argument that if such a test had been applied to the evidence in this case, the court's answer would have been in the affirmative.

The failure of the respondent to furnish any toilet in petitioner's locomotive or at any point in the area where the activities of petitioner and other employees were centered certainly played a part in producing the resulting injury to petitioner. Nor can it be seriously questioned that the evidence supported the jury's finding that such failure constituted negligence, where it was shown that access to a toilet was barred to any of the employees situated in this area by heavily traveled, intervening tracks and where the custom, consequently, in that area was for those employees to relieve themselves in nearby cars. Particularly is that finding justified in light of the uncontroverted evidence that a long freight train blocked petitioner's access to any toilet just prior to his injury. Respondent tacitly recognized the need for a toilet in the area of petitioner's accident, moreover, by providing a toilet in its shanty in a similar, central working area in the south part of the same yard.

An unsafe condition predicated solely upon the layout of the tracks and the location of other facilities in the railroad's yard was held to support a jury finding of negligent failure to furnish a safe place to work in the above cited case of *Glime v. New York Central R. Co.*, 126 N. E. 2d, 385. Similarly, liability was upheld for failure to furnish a safe access to and from sanitary facilities in the cases of *Ritchie v. Northern Pacific R. Co.*, 272 Pac. 2d, 728; and *Crecelius v. Chicago, M. & St. P. Ry. Co.*, 223 S. W., 413.

In conjunction with the above evidence, moreover, the jury could conclude that the force of the impact of the detached cars upon that occupied by plaintiff, knocking it a distance of 25 feet, and the sudden and forceful shift of the unsecured load of steel in that car constituted negligence, which without question, played a part in producing the resulting crushed leg of petitioner.

The court, however, did not apply the foregoing simple and correct test. Instead the court considered and weighed the evidence under the court's own concept of negligence and proximate cause. The court in its decision purported to be applying the "common law rule of negligence" (App. A, 32). The court, moreover, in what appears to be judicial revolt, cited with approval and gained basic support from decisions of two Circuit Courts which were subsequently reversed by this Court (App. A, 31, 32). In referring to one of those reversed decisions, namely, that in *Cahill v. New York, New Haven, Hartford R. Co.*, 224 Fed. 2d, 637, the trial court emphasized the statement in that decision that under the Federal Employers' Liability Act "The employer's duty is the same as that imposed by common law, namely, to use reasonable care in furnishing his employees with a safe place to work." While that same statement may be true in that strictly limited context, still the trial court's emphasis of such a statement is completely

misleading. The decision in this case was based essentially upon the court's concept, not of due care, but of proximate cause. In that respect there *is* a great deal of difference between the common law action and the statutory action. Moreover, there is a vast gulf between the common law duty of master to servant and that of the carrier to its employee under the Federal Employers' Liability Act. In fact that change was the very intention of Congress in enacting the law. This Court stated on February 25, 1957, in the case of *Rogers v. Missouri Pacific R. Co.*:

> "The law was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence."

This Court made the following additional statement in the foregoing case which is equally appropriate to the opinion below in this case:

> "The kind of misconception evidenced in the opinion below, which fails to take into account the special features of this statutory negligence action that makes it significantly different from the ordinary common-law negligence action, has required this Court to review a number of cases. In a relatively large percentage of the cases reviewed the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme."

Question 5.

The trial court in its decision granting judgment for respondent carefully separated the two hypotheses upon which the court had previously charged the jury. The court was careful to sift and choose the evidence favorable to its conclusion upon each hypothesis (App. A, 27, 28). The court either failed or refused to give any weight or sup-

port to the surrounding facts or circumstances, and treated the lack of toilet facilities and the switching operations as if the jury could not have found any inter-relationship between the two.

The trial court utterly failed to consider the aggregate weight of the evidence as a whole. Such over-all appraisal should and indeed must be made by a court, particularly in testing a general verdict for petitioner. *Blair v. B. & O. R. Co.*, 323 U. S., 600; *Bailey v. Central Vermont R. Co.*, 319 U. S., 350; *Union Pacific R. Co. v. Hadley*, 246 U. S., 330. At no time or place in its decision did the court give any effect to the over-all fact pattern in this case: the accident took place in an area which was the center of activity for many employees in the north part of a busy yard; from that area access to all available toilets was only over many intervening tracks, constantly and frequently occupied by moving trains and standing cars; no toilet was provided in petitioner's locomotive or in that area in the north part of the yard, although a toilet was installed in a shanty similarly located and used in the central part of a similar area in the south part of the same yard; in this particular instance petitioner's access to any toilet was in fact blocked by a long moving train, a common occurrence on the intervening tracks; a rule of the company forbade the employees from going between the cars of a moving train; prior to the accident employees of the respondent customarily relieved themselves in cars in this particular area; petitioner sought the nearest refuge in a gondola car; the impact of the rolling and unattended, detached cars under the view of evidence most favorable to petitioner knocked the car a distance of some 25 feet, and it was uncontroverted that the impact caused a sudden and forceful shift of heavy steel plates with sufficient force

to crush the lower part of petitioner's leg against the end of the car.

If the trial court had viewed the evidence as a whole as it was required to do, it could only have concluded that the jury's general verdict must not be disturbed.

The inconsistency between the court's action in charging the jury and its decision granting judgment to respondent is patently revealed with respect to the foregoing point. The court properly charged on the rule of unitary negligence (App. B, 40, 41), and thereby correctly informed the jury that it could consider all the evidence as a whole. Yet when judicially reviewing the jury's general verdict and finding, the *court* failed or refused to make such an over-all appraisement.

By means of reviewing the record piecemeal, the court completely eliminated significant evidence. The evidence relating to the sudden shifting of the load of steel was dismissed upon the ground that the complaint did not spell out a charge of improper loading. Yet a specific charge of the complaint was to the effect that the violent collision caused the load of steel to shift (App. 3a, 4a), and the court did submit this issue to the jury in its foregoing charge on unitary negligence. Improper loading alone constituted the basis for liability in the cases of *Union Pacific Company v. DeVaney,* 152 Fed. 2d, 24; and *Lee v. Louisville & Nashville R. Co.,* 119 N. E. 2d, 491.

By similar reasoning the court ruled out the evidence to the effect that the detached, unattended cars collided with the standing cars with sufficient force to move the gondola car 25 feet. The court held that respondent "had no duty to anticipate that a car was being used for such a purpose." (App. A, 28). The court again isolated one event and refused to recognize any possible connection with or bearing of other evidence, such as the lack of access to

toilets in that very area and the consequent preexisting practice on the part of its employees. As to respondent's duty toward petitioner in this respect, a railroad has been held to have a duty in connection with switching operations even to one who is stealing property from a car. *Bonnier v. Chicago B. & Q. R. Co.*, 119 N. E. 2d, 254. A similar duty was held to extend to one who was violating the railroad's rule by standing on the tracks behind a standing car and out of the sight of the crew engaged in switching a cut of cars against the standing car from the opposite end. *Terminal Railroad Association v. Schorb*, 151 Fed. 2d, 361.

If the evidence relating to the switching and the impact, therefore, had been upon review considered in conjunction with the other evidence, a general finding of negligence and causation, in part, could well be supported.

CONCLUSION.

The lower courts would make this a strictly common law action of negligence. Their decisions refuse to recognize the statutory mandate on causation and the interpretations of the Act by this Court. That action is not only an "erosion" of the Act, but a wide departure therefrom. This is certainly a case where this Court should fulfill its stated obligation "to effectuate the congressional intention." Certiorari should be granted; the judgment for respondent reversed; and the judgment for petitioner restored.

Respectfully submitted,

C. Richard Grieser,
8 E. Broad St., Columbus 15, Ohio,
Attorney for Petitioner.

APPENDIX A.

Decision.

(Filed March 15, 1956.)

Cecil, District Judge:

On October 7, 1950, Boyd R. Ringhiser, the plaintiff herein, arose in the afternoon, made preparation to report for duty at 4:45 p. m., had a bowel movement, made a mental calculation and thereby set in motion a chain of events which created a result both unusual and tragic.

The sequence of these events is as follows: The plaintiff's bowel movement was unsatisfactory; "This won't do," said he to himself (statement made by plaintiff at trial, but ordered stricken); he took a dose of salts and washed it down with sweet cider; he got in his car and drove to Parson's Yard, the switching yard of the defendant, and had a bowel movement at the roundhouse. He then got on his engine and maneuvered it to track twelve, where it was coupled on to a train scheduled for Walbridge Yard at Toledo. While sitting in his engine waiting for his air brake test, he had an urgent call of nature and "had to go quick." He dismounted from his locomotive cab to go to a toilet a short distance west. A long train of empties passed between him and the object of his immediate attention. He could not wait for this train to pass and went to No. 8 switch track and climbed into a low-sided gondola car to answer his call of nature. While thus engaged, a yard crew switched two cars into No. 8 switch track. These cars came in contact with the car ahead of plaintiff's car and it likewise came in contact with plaintiff's car. The gondola car in which plaintiff had taken his position was loaded with steel plates and when the cars made contact the plates shifted, caught plaintiff's right leg and crushed it so that a few days later, it had to be amputated.

This unusual series of events with its tragic result is equalled only by the novelty of plaintiff's claim that his injury was caused in whole or in part by the negligence of the defendant.

The claim was presented to a jury and resulted in a verdict in favor of the plaintiff for $40,000.

The case comes before the court on a motion of the defendant for judgment or in the alternative for a new trial. The question now before the court was presented at the close of the plaintiff's case and again at the close of all the evidence. On both of those occasions the court passed what seemed strongly to be an inescapable duty because of a persistent feeling of some uncertainty as to whether or not the unusual circumstances and the novelty of the question might present a jury question.

The court charged the jury that there were two hypotheses upon which the plaintiff might establish liability. One, did the defendant furnish the plaintiff a safe place to work? This had to do with the adequacy of toilet facilities. The other, were the defendant's employees negligent in switching the cars onto switch track No. 8?

By Plaintiff's Exhibit 1, a situation map of the west end of Parson's Yard, it is shown that there were five toilets within the proximity of the plaintiff's engine at the time of the accident. They were in three general directions from the engine, and were respectively 940′, 785′, 740′, 385′ and 217′ away. Thre was another one about a mile and a half to the east, in a switchman's shanty. There was a switchman's shanty near the place where the plaintiff's locomotive was standing. This had no toilet and the plaintiff centered his attack against the defendant's lack of facilities on this spot in particular.

Here was a condition that had existed for an indefinite period of time. The defendant had done nothing at the

time of the accident. It was operating a switch yard in the course of its business of railroading. Trains were arriving and departing. Trains were being made up and extensive switching operations were being carried on.

The court is of the opinion that the defendant could not be liable for negligence because of this condition unless it could have reasonably foreseen and anticipated that employees would be subjected to danger by reason of a lack of toilet facilities.

This is an essential element of this case and the court charged the jury as follows:

"The proximate cause of a result is that cause which in a natural and continued sequence contributes to produce the result, and without which it would not have happened. In order to arrive at a finding that negligence was the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, if any, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances. In contemplation of law, an injury that could not have been foreseen or reasonably anticipated, as the probable result of an act of negligence, is not actionable. The responsibility of the defendant for its employees does not extend to consequences which cannot be regarded as natural results of their conduct and which on that account could not by ordinary forecast have been anticipated."

In Brady v. Southern Ry. Co., 320 U. S., 476, the court said at page 483, quoting from Milwalkee & St. Paul Railway Company v. Kellogg, 94 U. S., 469:

"But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to

have been foreseen in the light of the attending circumstances."

To this quotation the court added "Events too remote to require reasonable provision need not be anticipated. • • • The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

The sequence of events and the result therefrom in this case are so extraordinary that to expect the defendant to have anticipated and foreseen such a consequence of not having an additional toilet at the switchman's shanty, or any additional toilets, would have been to expect the miraculous.

There is evidence that employees sometimes used gondola cars in lieu of toilets. The court must assume that this was known to the defendant. Whether it was done as a convenience or a necessity was not indicated. It appears that such use was neither approved nor disapproved by rule of the defendant. There is no evidence that any employee, committee of employees or union representative ever made complaint that there was a lack of toilet facilities.

It appears that the gondola car used by the plaintiff was only about forty feet away, (about three tracks over) while the nearest toilet was 217 feet away. The switchman's shanty was 175 feet from the plaintiff. Whether the plaintiff would have used a toilet or the gondola car as a matter of convenience or expediency is only a conjecture. In Defendant's Exhibit B, a statement of the plaintiff made at the hospital, he stated "My rush call was so urgent that I was lucky to be able to make it to the gondola car in time."

The plaintiff says there should have been sanitary facilities at the switchman's shanty. How many such facilities are enough? If the defendant must anticipate such hap-

penings as occurred to the plaintiff in what area might the next blow strike?

The court is impelled to the conclusion that there is no evidence upon which reasonable minds might differ to support a claim that the defendant did not furnish a reasonably safe place to work, so far as toilet facilities were concerned.

Upon consideration of all of the evidence concerning the switching operation, the court concludes that there was a lack of evidence upon which to base a finding of negligence. The plaintiff was in the car and in no position to see what happened. The only witnesses to the switching were the employees who did it. No inference of negligence can be drawn from their testimony. There was some conflict in the testimony as to how far the plaintiff's car moved after the contact. No inference of negligence can be drawn from the mere fact that the car moved any particular number of feet.

The plaintiff testified that he thought the car was an empty when he started to get into it. If it had been empty the plaintiff could not have been injured or at least nothing more than bumps and bruises. Again, the question of foreseeability arises. Could the defendant have reasonably foreseen or anticipated that placing a loaded car in such a place and that the normal switching of cars on to the same track in the operation of its business would produce such a result?

Even though the defendant had some knowledge that employees sometimes used gondola cars for the purpose of relieving themselves, it could not be required to inspect each car before coupling another car on to it. It had no duty to anticipate that a car was being used for such a purpose.

Viewing the evidence in the most favorable light to the plaintiff, the court is of the opinion that there is no evidence of negligence upon which reasonable minds might differ.

Counsel for plaintiff say in their brief that there is another item of negligence; that is, the manner of loading the car. This was not pleaded, no issue was raised on it during the trial, it was not argued by counsel and the court did not charge on it. The only evidence is that the steel shifted when the contact was made. It is claimed that the doctrine of res ipsa loquitur applies. The court concludes that this is not an issue in the case.

Finally, the court concludes that there is no evidence of negligence against the defendant to support the verdict of the jury. There is no debatable issue of negligence on which reasonable minds might differ. In arriving at this conclusion, the testimony is considered in the most favorable light to the plaintiff.

The motion of the defendant for judgment will, therefore, be sustained.

The basis of recovery in cases under Federal Employers' Liability Act is negligence, common law negligence, of the employer which in whole or in part causes the injuries of the employee. This is an essential element of the statute and it has been proclaimed by the Court of Appeals of the 6th Circuit as late as December 13, 1955, in the case of Herman v. Pennsylvania R. R. Co., 228 F. 2d, 902. The court said, "There was 'a complete absence of probative facts to support the conclusion' of negligence".

Counsel for the plaintiff and the defendant have cited a great many cases in their briefs in support of their respective positions. These are not particularly helpful for the reason that each case must stand or fall on its own particular facts. The cited cases show what in each of those cases

the court held was either negligence or not negligence. None of these cases are comparable to the one at bar on the facts.

The facts of Wolfe v. Henwood, 162 F. 2d, 998, certiorari denied, 332 U. S., 773, closely parallel the facts in the instant case. The court said at p. 1000, "Plaintiff's charge of negligence on the defendant's part is predicated on defendant's • • • failure to provide adequate facilities for cleansing after dipping the oil and for disposing of the oil-soaked waste."

• • • • • • • • • • • •

"The defendant had the duty to use reasonable care to furnish Wolfe a safe place in which to perform his work. (Citations) But defendant's obligation was not such as to impose liability for injury regardless of due care and regardless of whether the injury was one reasonably to be anticipated or foreseen as a natural consequence of defendant's act. In order to recover under the Federal Employers' Liability Act, plaintiff had the burden of proving that defendant was negligent, and that such negligence in whole or in part caused Wolfe's injuries."

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"Likewise the fact that there were no cleansing facilities at the toolhouse was of slight consequence. The proof was that facilities for washing were available at the roundhouse located not more than 500 feet from the toolhouse, and also at the depot, located about 200 feet from the toolhouse, and that Wolfe could have used these facilities." Page 1001.

Lavender v. Kurn, 327 U. S., 645, is cited by counsel for the plaintiff. This has an entirely different factual situation and is not helpful except as it may indicate a more liberal interpretation of negligence in this classes of cases.

In this connection, the cases of Atlantic Coast Line R. R. Co. v. Smalls, Bright and Mitchel, 216 F. 2d, 842, is noteworthy. The court said at page 844:

"We do not think, however, that there is any evidence of negligence on the part of the company to sustain a recovery by plaintiffs. It appears that the crossing at which the employees had congregated was 200 yards distant from the station. They were not ordered or invited by the company to stand in the highway at the crossing, and we know of no principle upon which the company could be held guilty of negligence in not lighting it. Their injuries resulted, not from any negligence of the company, but from their own negligence or the negligence of a third person, for whose acts the company was in no way responsible. Plaintiffs rely upon the decision in Lillie v. Thompson, 332 U. S., 459, 68 S. Ct., 140, 92 L. Ed., 73, where a woman employee was assigned to night work in a dangerous locality where she was likely to suffer injury from the criminal acts of persons who were not employees, but that case manifestly has no application here."

This case was reversed by the Supreme Court without opinion in 348 U. S., 946.

Cahill v. New York, New Haven & Hartford Railroad Company, 224 F. 2d, 637, is another case that was reversed by the Supreme Court, without opinion, 350 U. S., 898. The court said at the bottom of page 638:

"The duty to provide a railroad employee with a safe place to work is not an absolute duty; if it were, the employer would be an insurer of the employees' safety and negligence would be irrelevant. Under the Federal Employers' Liability Act, *the employer's duty is the same as that imposed by common law, namely, to use reasonable care in furnishing his employees with a safe place to work.* (Emphasis added) All work on a railroad involves some

danger, but it has to be done and the dangers involved do not involve liability, provided the railroad takes all practicable precautions consistent with the conduct of the business."

The principles above stated are well established principles of law and the court assumes they are correct. The Supreme Court, in reversing without opinion, did not announce any abrogation of these principles.

The facts in the Cahill case are not parallel with the facts in the case at bar. Judge Frank, in writing a dissenting opinion, takes the position that the railroad company was negligent in assigning an untrained man to perform the duties that he was required to do at the time he was injured. This dissenting opinion raises an interesting question. Judge Frank says at page 640:

"I assume, arguendo, that the inference needed to support the verdict would not suffice in a suit not brought under the Federal Employers' Liability Act, but the more recent Supreme Court decisions make it clear that, under that Act, the jury's power to draw inferences is greater than in common law actions. * * * They (majority of the court) neglect the following later decisions in which the court, as is generally recognized, adopted a new attitude in F. E. L. A., cases:"

The Supreme Court has never announced that the common law rule of negligence is not applicable to F. E. L. A. cases. This court holds, therefore, that it cannot be excused from applying the rule of common law negligence to the facts in the instant case. It is upon this basis that the court has reached its conclusion. In the light of this "new attitude" to which reference is made by Judge Frank, it is interesting to note the dissenting opinion of Mr. Justice Frankfurter in Stone v. New York, Chicago and St. Louis

Railroad Company, 344 U. S., 410. The entire opinion is most interesting. A portion of this opinion is as follows:

"However, the central components of liability for negligence—that it rests upon fault and that appropriate causality must be established between the negligent circumstances and the complained-of injury—are the same for actions under the Federal Employers' Liability Act as for any other negligence actions. For reasons that I for one have long deplored, Congress has seen fit to make such a concept of negligence the basis of compensation for inevitably untoward incidents.

"I deplore this basis of liability because of the injustices and crudities inherent in applying the common law concepts of negligence to railroading. To fit the hazards of railroad employment into the requirements of a negligence action is to employ a wholly inappropriate procedure—a procedure adequate to the simple situations for which it was adapted but brutally unfit for the situations to which the Federal Employers' Liability Act requires that it be put. The result is a matter of common knowledge. *Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.*" (Emphasis added)

The court, having arrived at the conclusion that the evidence fails to show that the defendant was negligent in the respects charged by the plaintiff, the question raised by counsel for the defendant that the court erred in its charge, is immaterial. However, in order that all questions presented may be disposed of, the court will proceed to pass on the motion for new trial. This question is raised

in support of counsel's contention that if the court does not grant judgment to the defendant, it should at least grant a new trial. From the inception of this trial, the court was concerned with the question as to whether or not there was any causal relation between any failure on the part of the defendant to have sufficient sanitary facilities and the injuries suffered by the plaintiff. This involved the matter of foreseeability. Could the defendant have foreseen, or reasonably anticipated before the acciden happened that any failure to have more sanitary facilities, would have such a tragic result? This matter was stressed throughout the charge of the court. After the jurors had been in deliberation for a period of time, they were brought back into court for the purpose of asking a question. In answering this question, the court again stressed the matter of foreseeability. Counsel for defendant has taken a paragraph of this supplementary charge out of context and then proceeds to base his argument upon one part of that paragraph. The entire charge was as follows:

"Now, if they failed to do this, if they failed to use and exercise ordinary care to provide a reasonably safe place for its employees to work that would be negligence. But in order for the plaintiff to recover or before there would be liability on the part of the defendant that negligence would have to be the proximate cause of the plaintiff's injuries.

"I will read a definition here and say a little more about it. The proximate cause of the result is that cause which in a natural and continued sequence continues to produce the result and without which it would not happen.

"In order to warrant a finding of negligence as the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent

act, if any, that it was such as might or ought to have been foreseen in the light of the attending circumstances.

"In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable and he cannot recover.

"The responsibility of the defendant for its employees does not extend to consequences which cannot be regarded as natural results of their conduct and which on that account, on ordinary forecast cannot be anticipated.

"I can elucidate a little further. In other words, if the defendant were negligent in not having enough toilets in order for the plaintiff to recover here, the defendant through its employees would have to anticipate that from the failure to have sufficient toilets, that is, they would have to have reasonably anticipated and foreseen that the probable result of not having enough toilets would be that this employee or some employee would be caught in an emergency and not be able to get to a toilet and have to use a car, as was done here, and that switching operations might occur as they did in this case and injure him."

The essential part of this supplementary charge was a prepared definition which was read to the jury. The court is of the opinion that this definition is correct. It was used in the original charge without challenge from counsel on either side.

The paragraph challenged by counsel for the defendant is what the court said in oral explanation of the definition. Counsel for defendant reads this paragraph to mean that the court imposed a duty upon the defendant to anticipate that the plaintiff or some employee might be using a gondola car in lieu of toilet facilities and therefore, must inspect each car before switching operations. The oral explanation appears to have been based on the matter of

lack of toilet facilities rather than the switching operation. As a part of this oral explanation, the court said: "they would have to have reasonably anticipated and foreseen that the probable result of not having enough toilets would be that this employee or some employee would be caught in an emergency". It seems clear to the court that this means in order for the railroad company to have been charged with negligence in failing to have enough toilets, it would have to have prior to the accident, foreseen and reasonably anticipated the result that did happen.

The court is of the opinion that there is no error in the charge and that the part complained of is in accord with Milwaukee & St. Paul Railway Co. v. Kellogg, and Brady v. Southern Railway Co., supra.

Counsel for defendant charges that the verdict is excessive.

The plaintiff had lost five years of income at the time of trial. If the loss of earnings are considered, there is very little left for pain and suffering and the loss of the limb with the attendant permanent impairment.

The court concludes that the damages awarded are not excessive.

The motion for new trial will be overruled.

(Signed) Lester L. Cecil
Judge, United States District Court, S.D.O.

APPENDIX B.

Charge of the Court.

The Court: Ladies and gentlemen, as I stated to you in the beginning, your duties, as jurors are to determine questions of fact, and the duties of the judge are to determine questions of law.

It is now my duty to instruct you as to the law involved in this case and you must apply that law to the facts as you find them to be. You will find the facts from the evidence in the case.

The opening statements that the lawyers made to you here, their closing summaries or arguments, statements that they have made during the progress of the trial, and likewise any statements that I have made here during the progress of the trial are not evidence.

In the course of a trial, it is the duty of the attorneys, on both sides, to make objections to evidence that they consider under the rules of evidence not to be admissible. So, when questions are asked and objections sustained, you will not draw any inferences from the questions asked or speculate on what the answer might have been.

Then, occasions arise when the judge will order some statement made by a witness to be stricken from the record. You will not consider any of those statements and you will put them out of your mind, as though they had not been made.

The case has been started by the filing of a complaint. This complaint states the plaintiff's cause of action, and the defendant files an answer, which, in legal terms is the defendant's answer to the claims made by the plaintiff. These papers, the complaint and the answer, are known as pleadings and you will have them with you in your jury room. They are not evidence and they are not to be considered by you as evidence, for any purpose whatever, except where there may be admissions stated in the pleadings, you may consider those without further testimony thereon.

Now, as has been stated to you, at the time you were qualified as jurors here, this is not a compensation case, that is, it is not the type of case that some of you are

familiar with, that arises under what we know as the State's Workman's Compensation Law. It is not a compensation case and the railroad company is not an insurer of the safety or protection of its employees.

This case does arise out of the federal statute, that is, an act passed by Congress, which provides generally that a railroad company is liable to an employee for injuries sustained, in whole or in part, by the negligence of the agents, servants or employees of the railroad company.

So, the essence of this case is negligence. I will define negligence for you, what we mean by negligence legally. Negligence is the failure to use ordinary care. Now, by ordinary care, we mean the same degree of care that an ordinarily cautious and prudent person would use under the same or similar circumstances. Negligence might be the failure to use ordinary care in doing a particular thing, or it might be the failure to do a thing, which in the exercise of ordinary care one would be required to do.

In considering negligence here you will bear in mind the defendant is a railroad company; that it is operating a railroad. So, as you apply the rules of ordinary care to the conduct of the agents, servants and employees of the railroad company, it would be that they are required to use the same degree of care that an ordinarily cautious and prudent person would use in operating a railroad.

Now, in cases of this kind, the issues may be divided into two categories: First, the issue of liability; that is, is the railroad company liable for damages to the plaintiff? And second, if there is liability, then what is the amount of damages to which the plaintiff is entitled. And may I caution you, that you must not consider that question of damages until you have first passed on and determined that there is liability.

You must not let sympathy for the plaintiff, or anything else, enter into your consideration of this case, and you must first determine this question of whether or not the defendant is liable. That is, what we mean by saying whether or not it is liable, that is, whether or not it was negligent, in such a way as to give the plaintiff a right to recover.

Under the claims made by the plaintiff, there are two hypotheses under which the plaintiff might recover, or under which the defendant might be liable.

I might say that under this federal statute to which I have referred, it has been held by the courts that it is necessary for the railroad company to use ordinary care to see that the employees have a reasonably safe place to work.

So, the first hypothesis you will consider is the claim made by the plaintiff that the defendant did not maintain a reasonably safe place for its employees to work, in that it did not have sufficient toilets or sanitary facilities, and particularly in the area referred to, wherein the plaintiff was working and this particular switchman's shanty.

Now, first, you will consider whether or not the defendant was negligent in not having sufficient sanitary facilities, but that is not enough. In addition to whether or not they had sufficient sanitary facilities, the defendant would not be liable unless it knew or realized that in the failure to have sufficient sanitary facilities it might reasonably anticipate or expect that a situation of this kind would develop, that is, that an employee who had taken a physic, as this employee had, and create an emergency, or any other emergency that would necessitate the use of toilet facilities; could they have reasonably anticipated that a failure, if there is a failure, or was a failure, of having

sufficient toilet facilities, that that would lead to the requirement of an employee to use a car for the purposes the plaintiff used this car, and that, as a result of that, with the switching operation, cars would come together and cause the injury.

Another hypothesis upon which there might be liability is that if the employees of the railroad company were negligent in the switching operation and that negligence caused the plaintiff's injuries. And in that connection, you must consider this, that mere negligence in switching the cars would not be enough. It would have to be done in such circumstances that the employees of the defendant could have reasonably anticipated that there might be someone in this car, for the purposes which the plaintiff was using it and might be injured, if they did not use reasonable care in the switching operation.

Now, in considering these two hypotheses and determining whether or not the Chesapeake & Ohio Railroad Company, the defendant, was negligent in that it failed to use due care to furnish plaintiff with a reasonably safe place to work, or in switching its trains, you may review and consider the railroad's conduct as a whole, including the act or failure to act of all of its officials and employees, and all the facts and circumstances and conditions, as shown by the evidence concerning the accident, including the presence or absence of toilet facilities at or near the place where plaintiff and other employees were required to perform their duties; whether or not there was reasonably safe access to toilet facilities by plaintiff and other employees from their place of work; their customary acts, if any, of railroad employees in relieving themselves in the cars near their place of work; the railroad's knowledge or lack of knowledge of such custom, if any; the manner of

coupling the cars, the impact on the gondola car of the switching operation, the presence or absence of a rider or lookout, and any other facts or circumstances shown by the evidence relating to the plaintiff's injury.

In considering this matter of the sufficiency of sanitary facilities, you will not consider the matter of convenience. It is not merely, would it have been more convenient to have one there, but was the defendant negligent in not having more toilet facilities?

And you will not measure the defendant's conduct by this particular act in this particular situation, but you will consider it generally, whether or not the defendant was negligent in not having a safe—a reasonably safe place for its employees to work.

Now I have mentioned to you that it is not enough that you find merely a negligent act, but that you must find that coupled with that negligent act there was a reasonable anticipation or expectation that such a result would follow. That is known as proximate cause and I will define proximate cause for you.

The proximate cause of a result is that cause which in a natural and continued sequence contributes to produce the result, and without which it would not have happened. In order to arrive at a finding that negligence was the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, if any, and that it was such as might or ought to have been foreseen, in the light of the attending circumstances. In contemplation of law, an injury that could not have been foreseen or reasonably anticipated, as the probable result of an act of negligence, is not actionable. The responsibility of the defendant for its employees does not extend to consequences which cannot be regarded as

natural results of their conduct and which on that account could not by ordinary forecast have been anticipated.

Now, it is the duty of the plaintiff to prove the acts of negligence by a preponderance of the evidence and so you will consider whether or not the plaintiff has established these hypotheses of liability, as I have stated them to you, or either of them, by a preponderance of the evidence.

If you find by a preponderance of the evidence that the plaintiff has established that the defendant was negligent in either of these respects that I have mentioned, and that the negligence was the proximate cause, as I have defined proximate cause for you, of the plaintiff's injuries, then the plaintiff would be entitled to recover, that is, that would establish liability. But if the plaintiff fails to prove by a preponderance of the evidence these things, then your verdict must be for the defendant.

Now, if you find that the defendant was negligent and that that negligence was the proximate cause of the plaintiff's injuries, and that the plaintiff therefore is entitled to recover, then you will consider the matter of damages.

If your verdict is for the plaintiff, you will award such damages as the proof tends to show he is fairly and justly entitled to receive. The sum or measure of the damages is just compensation, in money, for the actual loss sustained, by reason of the injuries, which flow as a proximate and natural consequence from the negligence of the defendant, for such an amount as will make the plaintiff whole. Take into consideration the nature of the injuries, whether they are permanent or otherwise, how they will affect the plaintiff, if at all; physical pain or suffering, if any, together with any impairment of ability to earn money in the future, which may appear to be reasonably certain; loss of earnings, if any, and expense for medical and hospital care, if any, or as you find it to be.

As I have said the burden of proof is upon the plaintiff to make out each and every essential element of his complaint by a preponderance of the evidence. By a preponderance of the evidence we mean the weight of the evidence. By weight of the evidence we mean that evidence which outweighs or overbalances, in your minds, evidence opposed to it. If you find that the evidence favorable to the defendant's claims equals or exceeds that which is favorable to the plaintiff's claim, the defendant must prevail, as the plaintiff has thus failed to sustain the burden of proof.

You should not be swayed or influenced by any feeling of sympathy or prejudice. It is the duty of the jury to carefully reflect upon the evidence and pay due regard to the charge of the court upon the law applicable to this case and thereafter to render a verdict according to the evidence. Facts and law should control your verdict. You should disregard all other things. Let your only effort be to arrive at a just and fair verdict.

If you consider anything that the court says in this charge as an expression of opinion on any disputed question of fact, you may disregard it because you are the sole judges of the facts, the weight of the evidence and the credibility of the witnesses.

It is peculiarly within the province of the jury to judge of the credibility of the witnesses; that is to say, the extent to which they should be believed and the importance and weight to be given to their testimony.

In considering the testimony of a witness you should take into consideration his interest, if any, in the outcome of the case; his affiliation, if any, with either of the parties, and any bias or prejudice which he might naturally be expected to have as the result of such interest or affiliation; but such interest or affiliation is not at all conclusive against

accepting his testimony. Those are simply facts which should be considered in weighing it. Likewise you should consider the demeanor of the witness upon the stand; whether his testimony, as a whole, is consistent or conflicting in some of its parts; whether or not there is anything in his manner of testifying that would indicate such prejudice or bias as might induce him to color his testimony or exaggerate the facts in favor of or against either party to the suit, and every other attendent fact and circumstance upon which you might reasonably base a conclusion as to the credibility of his testimony.

You are not obliged to accept as true the testimony of any witness or witnesses, if, in your opinion, judging from common observation, it may be mistaken, untrue or unreliable.

I have had the clerk prepare forms of verdict which you will have with you in your jury room for your convenience in returning to the court the conclusion which you reach. These forms of verdict read as follows: Omitting the caption of the case "We the jury, herein do find the issues joined in favor of the plaintiff and assess his damages at (blank)." Then there is a line for signature for the foreman. The other one "We, the jury, herein do find the issues joined in favor of the defendant."

You will not draw any inferences from the way in which these forms of verdict are read. Obviously I have to read one of them first and as a matter of long practice I always read the one applicable to the plaintiff's case first.

If your verdict is for the plaintiff you will fill in the amount of your verdict and the foreman will sign on the face of the verdict and the other jurors will sign on the opposite side of the verdict. Either verdict for the plaintiff or defendant, the foreman will sign on the face and the others will sign on the opposite side.

It requires a unanimous verdict in this court. All twelve must agree in order to return a verdict either for the plaintiff or defendant.

Does counsel for plaintiff have anything?

Mr. Dombey: May I walk up to the bench, Your Honor?

The Court: Yes. (After counsel confers with the court) Members of the jury, when I referred to the hypothesis of negligence with reference to the manner of switching, I said that coupled with that it was necessary that the employees under such circumstances would reasonably anticipate or expect that some employee might be in the car in the circumstances in which the plaintiff was.

It is called to my attention that I may have said only the plaintiff. In making that statement I would mean to say that if they have reasonable ground to anticipate that at the time they made the switching operations that anyone, any employee might have been in that car for the purpose for which the plaintiff was there.

The case is now submitted to you and when you arrive at a verdict you will rap on the door of the jury room, which will be attended by a deputy marshal.

You will have all the exhibits with you also in the jury room.

The case is now in your hands.

Thereupon the jury retired from the court room and entered upon its deliberations, and later, on the same day returned into the court room and the following transpired:

The Court: Ladies and gentlemen, have you arrived at a verdict?

The Foreman: We have not, Your Honor. There has been a difference of opinion among the members of the jury regarding some parts of your charge, sir. Would you like me to be more specific?

The Court: Yes. Do you want further instructions?

The Foreman: That's right, sir.

The Court: All right. What do you want to know?

The Foreman: The jury would like to have the part of your charge repeated which deals with negligence, especially that part regarding the presence or absence of toilets.

The Court: I don't have my charge written—that part of it wasn't written. I said under the law it is the duty, in the exercise of ordinary care, for the defendant to provide a reasonably safe place for its employees to work.

Now, if they failed to do this, if they failed to use and exercise ordinary care to provide a reasonably safe place for its employees to work that would be negligence. But in order for the plaintiff to recover or before there would be liability on the part of the defendant that negligence would have to be the proximate cause of the plaintiff's injuries.

I will read a definition here and say a little more about it. The proximate cause of the result is that cause which in a natural and continued sequence continues to produce the result and without which it would not happen.

In order to warrant a finding of negligence as the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligent act, if any, that it was such as might or ought to have been foreseen in the light of the attending circumstances.

In contemplation of law, an injury that could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable and he cannot recover.

The responsibility of the defendant for its employees does not extend to consequences which cannot be regarded as natural results of their conduct and which on that account, on ordinary forecast cannot have been anticipated.

I can elucidate a little further. In other words, if the defendant were negligent in not having enough toilets in order for the plaintiff to recover here, the defendant through its employees would have to anticipate that from the failure to have sufficient toilets, that is, they would have to have reasonably anticipated and foreseen that the probable result of not having enough toilets would be that this employee or some employee would be caught in an emergency and not be able to get to a toilet and have to use a car, as was done here, and that switching operations might occur as they did in this case and injure him.

Does that answer your question?

The Foreman: I heard a few noes. Does contributory negligence enter into this? Do we understand that?

The Court: There has been no charge of contributory negligence. The law is that if there is contributory negligence—there has been no charge of contributory negligence. I will not define the law of contributory negligence. There has been no charge there was contributory negligence here.

The question on that, with reference to the particular matter you asked, is whether or not the plaintiff or the defendant exercised ordinary care in providing a reasonably safe place for its employees to work and in that respect the claim is made that they did not furnish sufficient sanitary facilities and particularly in the one location.

Mr. Rector: Might I step up to the bench, Your Honor?

The Court: Yes, sir. (After counsel confer with the court) I might say one thing further with reference to negligence. If the plaintiff were himself negligent and his negligence was the sole cause of his injuries, he could not recover.

The Foreman: Your Honor, may I add one question?

The Court: Yes, sir.

The Foreman: It was understood by some members of the jury in your charge the statement was made something like this, that your statement was that the mere fact that the absence—that there were insufficient toilets would not in itself be negligence, considered negligence on the part of the defendant.

The Court: Well, I don't know whether I stated that but that would be true. The mere fact that there weren't sufficient toilets—there is a question what you mean by sufficient—would not in itself be negligence. The matter of negligence would be whether or not in not having sufficient toilets, the defendant failed to use ordinary care.

Now, by ordinary care, we mean, did the defendant—whether or not it had enough toilets, whatever it did with reference to toilets, did it fail to use the degree that an ordinarily cautious and prudent person operating a railroad of that kind would use in the operation of a railroad yard. And coupled with the question of whether or not it was negligent, you must determine, you must apply also the rule which I have given you with reference to proximate cause, that is, could they have foreseen that the failure to have toilets would lead to this result.

The Foreman: Thank you, Your Honor.

The Court: All right. You may retire and continue your deliberations.

Thereupon the jury retired from the court room to continue its deliberations and later, on the same day, returned into the court room with its verdict in favor of the plaintiff.

APPENDIX C.

United States Court of Appeals
For the Sixth Circuit.

Boyd R. Ringhiser, Appellant, v. The Chesapeake & Ohio Railway Company, Appellee.

Order.

[Dated December 19, 1956.]

Before Martin, McAllister and Miller, Circuit Judges.

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel for appellant, the court having granted permission to counsel for appellee to submit its case on the brief; and the court being duly advised,

Now, therefore, it is ordered, adjudged, and decreed that the judgment of the District Court be and is hereby affirmed for the reasons set forth in the opinion of Judge Cecil, sustaining appellee's motion for judgment notwithstanding verdict.

/s/ Thomas F. McAllister
United States Circuit Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 844.

BOYD R. RINGHISER,

Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner propounds five questions which he says are presented for review. But those questions are based upon the erroneous premise that the trial court substituted its judgment on matters of causation and foreseeability for that of the jury. Later on we will discuss that erroneous premise more fully.

The real question presented for review is:

Were the lower courts right in holding that there was no evidence to warrant a conclusion by fair-minded men that respondent could or should have reasonably foreseen that petitioner would suffer the accident that occurred and that there was no evidence upon which to base a finding of negligence warranting a recovery by petitioner?

COUNTER-STATEMENT OF THE CASE.

The resume of facts in petitioner's statement of the case is reasonably accurate as far as it goes, but it omits a great deal of important evidence. Consequently we are constrained to make a counter-statement of facts and to attach an appendix to our brief which contains the evidence supporting them.

(For the court's convenience we will adopt petitioner's method of reference, viz., "App. —a" refers to the page number of the certified record; "App. —A, —B", etc., refers to the page number of the appendix to this brief.)

Petitioner failed to state that he alone knew of having taken a physic on the morning of his injury and that he alone knew of his call of nature and just how urgent it was. (App. 40a.) Likewise petitioner did not advise the court that no one saw him leave his locomotive, no one knew he had left it and no one knew that he had climbed into a gondola car to relieve himself. (App. 44a and 45a; App. 11b.) Not one of respondent's employees was aware of his presence in the car when a switching crew moved cars into the track where petitioner's gondola was standing.

By innuendo, at least, petitioner would have the court believe that there was something unusual or rough or fast about the switching movement during which cars came in contact with petitioner's place of refuge. The only evidence concerning the switching movement is found in the testimony of the switching crew, all members of which testified that the movement was simply the ordinary and usual switching of cars in the yard; that the cars were not even "kicked" into the track, but were allowed to drift on a slight downgrade toward the standing cars; that at no time did the speed exceed 4 to 6 miles an hour; and that

when the cars came together the impact was nothing out of the ordinary. (App. 1b to 6b, incl.) Petitioner testified he did not hear the cars approaching and therefore has no idea how fast they were moving. (App. 41a.)

On October 18, 1950, about ten days after his injury, petitioner was interviewed by a representative of the railway company and his version of his accident was taken down and transcribed in a statement. That statement is in the record as Defendant's Exhibit B. (App. —S.) In addition, an investigation was conducted by the road foreman of engines and the trainmaster. The testimony taken at the investigation was also transcribed and appears in the record as Defendant's Exhibit C. (App. —V.)

In the statement given respondent's representative petitioner said, concerning the switching movement: "This was a very easy impact and the two standing cars did not move over a foot at the most". He also said: "This impact was not anyways near as hard as a normal switching impact usually made by a yard crew. I certainly do not feel that the yard crew was careless in any manner in making this move."

At the investigation petitioner testified:

> "Q. Can you say if there was any mishandling of the switching or anyone at fault for the accident?
> A. No. They did not kick the cars in there hard enough to hurt anything and they were not to blame."

THE ARGUMENT.

Were the lower courts right in holding that there was a lack of evidence upon which to base a finding of negligence warranting a recovery by petitioner?

As stated in petitioner's brief the trial court submitted this cause to the jury and the jury returned a verdict for petitioner. Subsequently the court sustained respondent's motion for judgment, notwithstanding the verdict, and that judgment was affirmed by the United States Court of Appeals for the Sixth Circuit.

Reduced to its practical import petitioner's entire argument rests on the contention that the trial court substituted its judgment for that of the jury. That argument is utterly refuted in the trial court's decision on respondent's motion for judgment n. o. v. What the trial court actually decided is succintly stated in the following excerpt from his decision:

> "Finally, the court concludes that there is no evidence of negligence against the defendant to support the verdict of the jury. There is no debatable issue of negligence on which reasonable minds might differ. In arriving at this conclusion, the testimony is considered in the most favorable light to the plaintiff."

The trial court's thinking is reflected in his remarks in ruling upon respondent's motion for a directed verdict at the conclusion of all of the evidence. The following colloquy took place:

> "Mr. Rector: Now, at the conclusion of all the evidence, the defendant renews its motion for an order directing the jury to return its verdict in favor of the defendant. Does Your Honor wish to hear further argument on that?
>
> The Court: No, I don't think so. The court is impressed with the force of the argument and the strength of the defendant's case in the motion for a directed

verdict. I have been thinking about this constantly throughout the progress of the trial and I have come to the conclusion that I will overrule this motion now. The court has an opportunity to further pass on it, but the court will overrule the motion at this time."

In the light of the trial court's later ruling we are confident that the court, in submitting the case to the jury, felt reasonably certain its verdict would be for respondent. In thus submitting the case the court but followed the time-honored practice, encouraged by the appellate courts, that to allow a jury to reach a verdict can do no harm even where the judge is fully convinced that there is nothing for the jury to decide. In the vast majority of cases if the jury reaches the correct verdict that ends the matter and in the event the jury goes wrong the court always has an opportunity to correct the situation, as was done in this case.

We respectfully invite the court's close examination of the trial court's decision on the motion for judgment n. o. v. His careful analysis of the authorities and the soundness of his reasoning cannot be successfully challenged.

In his brief petitioner says that the lack of toilets *led* to the result, viz., petitioner's injury. But, also, the physic that petitioner had taken *led* to the result. Certainly respondent cannot be held responsible for that. And any causative factor in connection with the claimed lack of toilets disappears when the court considers that petitioner himself said "When I left my engine to go to the gondola I had to get some place quick to relieve myself because I knew I would have a bowel movement at any moment" (App. —U) and "my rush call was so urgent that I was lucky to be able to make it to the gondola car in time." (App. —V.) Petitioner could not have "made it" to any toilet.

Petitioner also argues the court refused to give any weight to the impact of the switching and shifting of the "unsecured load of steel". But, negligence in the manner of loading the car was not pleaded, no evidence on that subject was introduced, no issue concerning it was raised and it was not argued by counsel. The only witnesses to the manner of switching the cars which came in contact with petitioner's car were the switching crew who testified as set out in the counter-statement of the case, supra.

And in the statement given a representative of the railway company a few days following petitioner's accident, he said:

> "No one knew I was inside the gon. I do not believe the yard switching crew knew or had reason to believe I was inside that car. Although I heard the car coming in on me from the west, I did not see that car because of the car to the west of the gon. The car was not coming in very fast because the impact or hit was not very hard. This impact was not anyways near as hard as a normal switching impact usually made by a yard crew. I certainly do not feel that the yard crew was careless in any manner in making this move. This was a very easy impact and the two standing cars did not move over a foot at the most." (App. —U.)

It is firmly established by the authorities that a defendant is only liable for the foreseeable consequences of its actions. The rule is well stated in *Commonwealth Steel Company v. McCash*, 184 Fed., 882, in which the court say:

> "There must be proved a danger, either known, or which by reasonable diligence could have been ascertained by defendant."

Did the law require respondent to anticipate petitioner's presence in the gondola car when respondent switched two cars into the track on which it was standing? In answer-

ing that question, let us assume for illustrative purposes that respondent's switching crew are making up a coal train. According to petitioner, respondent's trains usually consisted of from 150 to 160 cars. (App. 17a.) Let us further assume that the train has been assembled to include, say 60 cars. To complete making it up would require the crew to add another 90 to 100 cars and those cars would be coupled in bunches of 1, 2, 3 or more in each cut. Under petitioner's theory of respondent's duty toward him, the crew, before switching any more cars onto the 60 cars already standing on the track, would be required to inspect every one of the 60 cars to determine whether or not an employee was in one of them. And that procedure would perforce have to be gone through with every time an additional car was added; and so on ad infinitum until all the 160 cars were coupled into the train. We do not intend to labor the point further but do suggest that such a requirement transcends any conception of ordinary care.

If respondent was not required to make the absurd inpection suggested above, then what obligation or duty did respondent owe petitioner? Neither the crew, nor anyone else, knew of petitioner's presence in the gondola and they were entirely ignorant of the fact that he might possibly have been in a place of danger. They were entitled to go about their work in the usual and customary manner and to switch the cars as they did. There was no negligence in that connection.

It is idle for petitioner to assert that the trial court based its decision on the motion for judgment n. o. v. by considering "each ground for recovery piecemeal." In discussing the lack of evidence the trial court but followed the pattern set by petitioner in his complaint as follows:

(a) In that it failed to provide toilet facilities for use of its employees, particularly the plaintiff situated as he was

in the defendant's extensive switching yard and remote from any toilet facilities.

(b) In that it caused and permitted one or more cars to be kicked onto the track on which said gondola car was standing, with great and unusual speed, causing said gondola car to be so violently struck and moved as to dislodge the shipment of steel bars, and cause them to shift to the end of the car.

The court's conclusion was based on the lack of evidence to support any charge of negligence against respondent.

Petitioner cites numerous cases in which the courts have interpreted the Federal Employers' Liability Act. All of these cases can be distinguished from the case at bar on the facts. It would serve no useful purpose to burden this brief with a discussion of the facts in all of them. Suffice it to say that our research has failed to disclose any case in which the facts even remotely resemble those of the instant case. Nor can we find where anyone has dreamed up a theory of liability as bizarre as presented here. The Federal Employers' Liability Act is still a liability statute and recovery thereunder must be based on the negligence of defendant railroad company. *Moore v. C. & O. Ry. Co.*, 340 U. S., 573.

In *Brady v. Southern Ry. Co.*, 320 U. S., 476, the court reiterated the well-established principle governing recovery in a case such as this. On page 483 of the opinion, quoting from *Railway Company v. Kellogg*, 94 U. S., 469, the court say:

> "'But it is generally held, that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.'"

The court added:

> "Events too remote to require reasonable prevision need not be anticipated. * * * The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events."

Petitioner places his greatest reliance on the recent cases of *Ferguson v. Moore-McCormack Lines, Inc.*, *Rogers v. Missouri-Pacific Railroad Co.*, and *Webb v. Illinois-Central Railroad Co.*, reported in Supreme Court Reporter, for March 1, 1957, at pages 457, 443 and 451. In the same volume at page 455 is reported the case of *Herdman v. Pennsylvania Railroad Co.*, which petitioner fails to mention.

The above-cited four cases appear to be the latest F. E. L. A. and Jones Act cases in which the court granted certiorari. It might be well to distinguish them.

In *Ferguson v. Moore-McCormack Lines, Inc.*, a suit under the Jones Act, petitioner sustained injury when his hand slipped onto the blade of a sharp butcher knife with which he was chipping hard ice cream. It appeared respondent had failed to furnish him with proper tools with which to do his work and there was evidence that respondent had failed to properly transfer the ice cream to a tempering chest in sufficient time to allow it to become handleable. This court held that a jury could have concluded petitioner had been furnished no safe tool to perform his task, and consequently that respondent could have foreseen that some other tool, such as the knife in this case, might be used by petitioner.

In *Rogers v. Missouri-Pacific Railroad Co.*, petitioner was injured when the flames from weeds he was burning along the right of way were fanned into violence by a passing train, causing petitioner to seek to extricate himself in haste and confusion, resulting in a fall which injured

him. This court held that since petitioner had been instructed to watch passing trains for hot journal boxes, in addition to his work of burning weeds, and was injured while so engaged, the jury could have determined that respondent was or should have been aware of conditions which created a likelihood that petitioner would suffer just such an injury as he did.

In *Webb v. Illinois-Central Railroad Co.*, petitioner was injured when he stepped on a clinker imbedded in respondent's roadbed and fell. This court held that a jury question was presented by the evidence bearing on the adequacy of respondent's roadbed inspection practices used to discover hazards to firm footing.

How vastly different is the situation presented here. Petitioner took a physic, concerning which respondent knew nothing; petitioner had a call of nature of which respondent was completely ignorant; and petitioner left his locomotive and sought relief in a gondola car which was nearby. While he was in the car respondent's switching crew moved two cars into the same track. These cars came in contact with petitioner's gondola; a portion of the load shifted and caught petitioner's foot. According to petitioner's own statement, no one knew about his call of nature, no one saw him leave his locomotive; no one observed him enter the gondola car and not a single member of the switching crew knew he was in it. Can it be said that respondent was chargeable with anticipating or foreseeing that weird series of events which culminated in petitioner's injury? Even under the decisions in the three cases discussed above, it is impossible to find any evidence in this case which could support a recovery by petitioner either under common law negligence or, if there is a difference, negligence as interpreted by the courts in F. E. L. A. cases.

In *Herdman v. Pennsylvania Railroad Co.*, supra, this court held that in the absence of evidence to show that unscheduled and sudden stops of trains were unusual or extraordinary occurrences, the evidence presented no jury question under the doctrine of res ipsa loquitur, and that petitioner therein was chargeable with anticipating them. Is not that principle particularly applicable here? Petitioner testified that his accident occurred in a busy classification yard where cars were constantly being switched and trains made up. That of course was neither unusual nor extraordinary and petitioner is surely chargeable with the duty of anticipating that cars would be switched against the gondola car in which he sought relief.

CONCLUSION.

If the decisions of the lower courts were correct then this court is not called upon to grant certiorari under the provisions of Rule 19. That petitioner was injured is regrettable, but under no principle of law can respondent be held liable therefor. There is no evidence in this record upon which actionable negligence can be based. Certiorari should therefore be denied.

Respectfully submitted,

RICHARD T. RECTOR,
50 East Broad St., Columbus 15, Ohio,
Attorney for Respondent.

APPENDIX.

Excerpts of Testimony.

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(127) **Mr. James P. Drugan,**
being duly sworn, testified as follows:

Direct Examination

By Mr. Rector:

Q. Will you state your name, please? A. James P. Drugan.

Q. Where do you live? A. 2228 Groveport road.

Q. By whom are you employed? A. Chesapeake and Ohio railroad.

Q. And in what capacity? A. Yard conductor.

Q. How long have you been so employed? A. Since 1924.

Q. So I take it you were in the employ and acting as yard conductor on October 7, 1950? A. Yes, sir.

Q. Do you remember that date? A. Yes, I remember that date.

Q. You remember that as being the date on which Mr. Ringhiser suffered an accident? A. Well, yes. I am pretty sure I know that was the date.

Q. Now, about four o'clock or thereabouts in the (128) afternoon of that day, where were you? A. About what time?

Q. About four o'clock? A. I went to work about 3:58.

Q. Make it four. A. 3:58. Our time starts 7:58, 11:58.

Q. In the afternoon at 3:58? A. I was coming off from the empty yard with three cars.

Q. You were then acting as yard conductor? A. That's right.

Q. With a switching crew? A. That's right.

Q. Who were the members of that crew, if you remember? A. Well, I had Gries, as fireman, and William Feyen was the engineer, and P. T. Miller, brakeman; E. H. Chin was a brakeman, and myself was conductor.

Q. What were you and your crew doing about that time? A. Our first assignment was to get these three cars that had been weighed. I have forgotten whether I weighed them or not. Anyhow, they came off the scales in the scale shop to deliver them to the heavy side, over to the load side. That is the heavy side, we call that.

(129) Q. You picked up three cars? A. That's right.

Q. And were the cars ahead of your locomotive or behind it? A. Behind it.

Q. And the locomotive was pulling them? A. That's right. We pulled them to deliver them on the other side. To pull them off the light side—to deliver them, we had to back up with the cars.

Q. At the time of the delivery of the three cars on the heavy side, the locomotive was backing south; is that right? A. Yes.

Q. With three cars ahead of it? A. Behind it. We were heading west.

Q. Anyhow, the movement was backwards? A. Yes, sir.

Q. What did you do with these three cars? A. Well, if I can remember correctly, we put one in 10.

Q. You mean track number 10? A. Track 10. Then we backed down to number 8 switch, and that is a classification yard. I presume there is approximately one per cent grade. When we classify cars, in order not to do any damage or rough handling of cars, I (130) just slack the cars off, that is like putting two pieces of bread together in a sandwich, and uncouple the cars.

Q. I don't think these ladies and gentlemen will understand exactly what you mean by "bunching the slack". You mean by that, that you relieve the tension? A. That's right.

Q. Between the coupler on one of those cars which was coupled to the locomotive and the locomotive— A. No, we had a caboose behind us.

Q. All right. The two cars then were coupled to the caboose? A. That's right.

Q. And by "bunching the slack", you relieve the tension between the caboose and one of those cars? A. Yes.

Q. Why did you relieve that tension, or why was that necessary? A. The cars were setting on a grade and the drawbars, the pressure was pulling against each other. In order to get the drawbar, to get the cars cut off, we had to push the drawbars together.

Q. In order to get them off, what did you do? A. To bunch the slack, to press the two drawbars together.

Q. Did somebody have to pull the pin out of the (131) coupling to release it? A. In order to uncouple the car, there is an operating lever you must lift so that releases the knuckle lock in the car ahead and permits the car to pull away from the opposite car.

Q. Is that what you call pulling the pin? A. Yes.

Q. And as you operated that lever, that releases the coupler? A. That is right.

Q. Then what happened to these two cars? A. Well, all I know they run in the track. I seen it went to the clear. I went to the phone for another assignment. I went into the office there. We have a telephone office there.

Q. Did you see the cars moving on number 8 track? A. They were moving when I saw them.

Q. They were not pushed or kicked into number 8 track? A. No.

Q. Is that a fact that they were moving under their own power on a slight downgrade? A. That's right.

Q. Did you see how many cars were standing in number 8? (132) A. No. I know there was one car, a gondola, but I don't know how many were opposite it. In fact, I was not concerned as long as I had enough room for my cars.

Q. Did you see the two cars that you had released come in contact with the cars that were standing on the track? A. No, I didn't.

Q. How far away from the switch point were these cars standing in number 8 track? A. I would say about 10 car lengths from the lead.

Q. By "car lengths", you railroad men refer to about 40 feet? A. That's right.

Q. So those cars would be about 400 feet from the switch point? A. Approximately, yes.

Q. That would be as far as your two cars would get? A. That is as far as they could go.

Q. Do you know at what speed the two cars were moving when you saw them? A. About 2 to 4 miles an hour.

Q. You didn't see them come into contact with the other cars? (133) A. No, I didn't.

Q. I will ask you this question, Mr. Drugan: Was that movement done in the ordinary way and was there anything at all unusual about the way it was performed? A. No. That is a very conservative way to switch a car on a grade. You don't have to kick cars in that yard.

Q. They were not kicked. They were simply drifted down? A. That's right.

Mr. Rector: That is all.

(154) **Mr. Paul T. Miller,**
being duly sworn, testified as follows:

Direct Examination

By Mr. Rector:

Q. Keep your voice up, Mr. Miller, so we can all hear you. A. Okay.

Q. What is your full name and address? A. Paul T. Miller, 1538 South Fourth street.

Q. What is your occupation? A. Yard conductor, working as yard brakeman.

Q. You are a promoter man? A. Yes, sir.

(155) Q. By whom are you employed? A. Chesapeake and Ohio railway.

Q. How long have you been so employed? A. 12½ years.

Q. So you were employed as a yard brakeman, I take it, in October, 1950? A. I was.

Q. Do you remember an occasion during that time when Mr. Ringhiser suffered an accident? A. Pardon me. I didn't hear the question.

Q. Do you remember an occasion where Mr. Ringhiser suffered an accident during that month? A. Yes.

Q. You were on duty at the time? A. Yes.

Q. About what time was it? A. Approximately five o'clock, or close.

Q. And you had been switching cars? A. Well, we switched two cars.

Q. Now, into what track did you switch those two cars? A. Number 8 track.

Q. Will you describe to the jury, very briefly, now, how you accomplished that movement, how far the cars went, the speed with which they moved and all about it?

(156) Mr. Dombey: I object to the form of the question.

The Court: Overrule the objection.

Q. Just tell them what happened. A. We shoved down

to this number 8 switch, and stopped, and got the slack action on these two cars, which would be so you could pull the pin. That is the technical word. Cut the cars off and they drifted down the 8 track approximately six miles an hour.

Q. Who pulled that pin? A. I did.

Q. Did you watch the cars go down the track? A. Yes, sir.

Q. Did you see them come in contact with the other cars standing on the track? A. I didn't pay any particular attention to how fast or how hard they hit, or anything.

Q. Was this an ordinary, customary switching movement? A. It was.

Mr. Dombey: I move the answer be stricken. I object to the question.

The Court: I overrule the objection.

Mr. Dombey: Exception.

Q. Those cars were not kicked or shoved into number 8 track? (157) A. No, sir.

Mr. Dombey: Object and move the answer be stricken. It is leading the witness.

The Court: It is a leading question.

Mr. Rector: I apologize if it was, Your Honor. I withdraw it.

Q. I will ask you what is the fact, were those two cars kicked or shoved into number 8 track?

Mr. Dombey: Object.

The Court: Overrule the objection.

A. Not kicked or shoved.

Q. And is it a fact that they drifted under their own power down a slight grade into number 8 track? A. Yes, sir.

Q. Following that, where did your crew go? A. Well, our conductor went to the telephone.

Q. You stayed there at the switch point? A. That's right.

Q. And the conductor went to telephone? A. Yes, sir.

Q. What happened next? A. One of the boys ran in there and told him there was a man hurt down there. So we went down. We had our engine and caboose and we went to where the man was hurt and they carried him over to the caboose and put him on the (158) platform of the caboose.

Q. Do you remember what track you used to go down? A. What they call the ladder track.

Q. It was not number 8? A. No, sir.

Q. You went down opposite to where he was? A. Yes, sir.

Q. Did you help put him in the caboose? A. No, sir.

Q. There were other people helped him? A. Yes, sir.

Q. After you got him in the caboose, what did you do? A. We took him up to where the ambulance had driven up there and they had a stretcher and took him across to the ambulance.

Mr. Rector: That is all.

(171) **Mr. Robert Harry Hohman,**

being duly sworn, testified as follows:

Direct Examination

By Mr. Rector:

Q. Robert, will you state your full name? A. Robert Harry Hohman.

Q. Where do you live? A. In Cincinnati, Ohio.

Q. What is your occupation? A. District claim agent, Chesapeake and Ohio (172) Railway Company.

Q. What district is in your charge now? A. The Chicago, Cincinnati and part of the Russell division of the C. & O. Railway Company.

Q. You were employed by whom in October of 1950? A. I was employed by the Chesapeake and Ohio Railway Company here in Columbus, as district claim agent.

Q. Now, is it part of your duties, Mr. Hohman, to interview and secure the facts from an employe who has been injured? A. Yes, sir, it is.

Q. Did you do that in the case of Mr. Boyd Ringhiser? A. Yes, sir; I did.

Q. Where did you interview him? A. At Grant Hospital.

Q. Before you interviewed him, had you consulted with his doctors? A. With Dr. Baldwin, I consulted him.

Q. And then did you go to Mr. Ringhiser's room? A. Yes, sir.

Q. When you got there, did you introduce yourself, or did he know you? A. I introduced myself. I had never met him before.

(173) Q. Where was he? A. He was in Room 205 at Grant Hospital.

Q. Was he in bed or otherwise? A. He was in bed.

Q. What was his appearance? A. He appeared very friendly, and very alert and in good spirits.

Q. Did he appear to be suffering any pain? A. Not that I could distinguish. As I say, he appeared normal in appearance.

Q. Did you ask him whether or not he had any objection to telling you the facts concerning his accident?

Mr. Dombey: I think that is leading the witness by the nose.

The Court: Sustain the objection.

Q. Did Mr. Ringhiser evidence any objection to talking to you?—

Mr. Dombey: We object.

Q. (Continued) —And telling you about his accident?

Mr. Dombey: Withdraw that objection.

A. No, sir, he did not. He told me about his accident very freely.

Q. Now, while you were there talking to him, did you put down on paper what Mr. Ringhiser told you? (174)

A. Yes, sir, I wrote it all down.

Mr. Rector: Mark this as Defendant's Exhibit A for identification.

Thereupon a document was marked for identification as Defendant's Exhibit A.

Q. I will hand you what has been marked as Defendant's Exhibit A, and ask you whether or not that is what you wrote down and what Mr. Ringhiser told you when you interviewed him in Grant Hospital? A. Yes, sir, it is, and it is in my handwriting.

Q. What was the date of that interview? A. October 18, 1950.

Q. And does that exhibit contain exactly what Ringhiser told you? A. Yes, sir, it does.

Mr. Rector: I wish to offer it at this time and request the court for permission to have Mr. Hohman read it to the jury.

The Court: It may be admitted.

Thereupon said statement was admitted in evidence as Defendant's Exhibit A.

The Witness: (Reading) "Interview at Grant Hospital, Room 205, Columbus, Ohio, October 18, 1950. Statement of Boyd R. Ringhiser.

"I am 54 years of age, divorced, no dependent children, but have two grown boys and live at Route No. 2, (175) Carroll, Ohio. I am employed by the Railway Company as road engineer. In service since August 10, 1917 or 1918.

"On October 7, 1950 I was on duty as engineer of Extra 3028 west; called for 4:45 p. m.; on duty at 4:15 p. m. and

at about 5:30 p. m., while in the cab of my engine, I felt a rush call to make a bowel movement, come on me. So I got down off my engine and walked over from my engine on number 12 track, Parsons yard, to a low-side gondola car standing on either number 7 or number 8 track; climbed up into the west end of that gon and found an open area at the west end of that car, not covered with steel slabs. So I squatted down with my feet on the bed of the car and I had just relieved myself when I heard another car approaching from the west, and I realized that it might be moving on the track I was on, so I promptly stood up and tried to get my both feet in the clear of the steel slabs in the car. I got my left foot back far enough in the clear of the slabs, but did not get my right foot back far enough, and the car I had heard approaching continued rolling until it struck against another car which was coupled to the west end of the car I was in. The impact caused the slabs of steel in the gon to shift to the west and catch my right foot, shove the foot against the end of the car and the slabs then shifted back to the east and freed my foot. I got up on the steel slabs, threw my suspenders over my shoulder, went over to the corner of (176) the car nearest my engine and called to my engine for help.

"My fireman, Sheppard, was the first man to me. I was removed from the car, taken on caboose to an ambulance and brought to Grant Hospital where I am still confined under the care of Dr. H. A. Baldwin. My right leg, above the ankle, was amputated some days later.

"When I boarded the low-side gon, it was the easternmost of two cars coupled together and the gon was just about straight across from the cab of my engine. The front end of my engine was right close to number 12 switch. Num-

ber 12 track leads off of number 11 track. It was a clear day and still good daylight at time of accident.

"I had not told my fireman, or anyone else, that I was going over into the gondola car. Our helper engine was coupled to the front end of my engine at time of accident and we were awaiting our air test prior to departure for Walbridge. We had coupled the two engines together on the ready track at the roundhouse.

"No one knew I was inside the gon. I do not believe the yard switching crew knew or had reason to believe I was inside that car. Although I heard the car coming in on me from the west, I did not see that car because of the car to the west of the gon. The car was not coming in very fast because the impact or hit was not very hard. This impact was not anyways near as hard as a normal switching (177) impact usually made by a yard crew. I certainly do not feel that the yard crew was careless in any manner in making this move. This was a very easy impact and the two standing cars did not move over a foot at the most.

"While I do not know whether the hand brakes were set on the two standing cars, I do not think the hand brakes were set. I feel that the yard crew had a perfect right to make the move they made in the track in question without first finding out whether I, or anyone else, was in one of the cars.

"Before I left home, I had a small bowel movement, but I did not think the amount was sufficient, so I took a little dose of salts and chased it down with about three or four swallows from a jug of sweet cider. After arrival at roundhouse washroom, my bowels moved again about 15 or 20 minutes before time to get on my engine. After boarding my engine, I could still feel the effects of my physic. When I left my engine to go to the gondola, I had to get someplace

quick to relieve myself because I knew I would have a bowel movement at any moment.

"The nearest toilet to my engine was one on the other side of the coal bunk, but I would have had to cross over two trains or more to get there; and there is another toilet to the south, but I would have had to cross several trains and tracks being switched to get there. My rush call (178) was so urgent that I was lucky to be able to make it to the gondola car in time.

"I generally weigh around 210 pounds, am about 5 feet 8 inches tall. Prior to this accident I had no physical impairment and my legs and feet were entirely normal."

Mr. Rector: Stop there, Mr. Hohman. I don't want him to read what the court ruled out yesterday.

Q. Did Mr. Ringhiser sign that statement? A. No, sir, he did not. He declined to sign it that day.

Q. Did you read it to him? A. Yes, sir. He read it himself.

Q. What did he say?

Mr. Dombey: He didn't ask you that. Object to the answer.

The Witness: I beg pardon.

Q. And did you ask him whether or not it was correct? A. Yes, sir; I did.

Q. What did he reply? A. He said, "It tells the truth as best as I know how."

Q. Now, did you subsequently transcribe that statement on the typewriter? (179) A. Yes, sir, I did.

Mr. Rector: This would be Exhibit B. Mark it.

Thereupon a document was marked for identification as Defendant's Exhibit B.

Q. I will hand you Exhibit B and ask you whether or not that is a stenographic transcript of the statement you have

just read to the jury? A. Yes, sir. This is an exact typewritten copy of it which I have signed.

Q. Now did you go back to the hospital with that typewritten transcript and again interview Mr. Ringhiser? A. Yes, sir; and I have a note on this to that effect, that I went back two days later, on October 20. The note further states, and I recall, that he did read this typewritten version of the statement at that time and he said that it told the story exactly as he recalled it and that it was true but he again declined to sign this or any other kind of statement.

Mr. Rector: I offer Defendant's Exhibit B, which is a transcript.

The Court: It may be admitted.

Thereupon said transcript of statement was admitted in evidence as Defendant's Exhibit B.

Mr. Rector: Cross examine.

(180) **Cross Examination**

By Mr. Dombey:

Q. Mr. Hohman, how long have you been a claim agent for the C. & O. railroad? A. Since shortly before the war, about 1942, 1941.

Q. One of your principal duties is to take statements, if you can get them from your employees, if they are injured. A. That is part of my duties, investigate and handle claims to their conclusion.

Q. And to get a statement from Mr. Ringhiser, if you could get one? A. Yes, sir.

Q. And do you know when his leg was amputated? A. Some five days before I went to the hospital to take his statement.

Q. And the statement that you have read here, was that the language that Mr. Ringhiser used? A. He said that or words to that effect.

Q. What do you mean by that? A. Exactly that.

Q. Well, just what do you mean by that? A. I think that is pretty general terminology.

Q. He either used the language, or he did not. What do you mean, words to that effect? (181) A. Everything in there is what Mr. Ringhiser told me or meant to convey when he told me.

Q. Or meant to convey to you that you reduced to your language? A. That's right.

Q. In other words, he didn't use the word "So I promptly stood up", did he? A. So I what?

Q. "Promptly stood up". A. That is a good example of what I meant, "words to that effect". He may well have said: "I stood right up", and I may have said: "So I promptly stood up".

Q. And he didn't say "was amputated some days later"? A. I could have said: "My leg was cut off" and I could have inserted the word "amputated", yes, sir.

Q. And he didn't use the word "easternmost", did he? A. I wouldn't recall whether he used that specific word or not. He could have said "east" and I said "easternmost", but again it confused the meaning and I was there to get the story that he had to tell me as best as I could and to put it down in intelligent English.

Q. He did not use the word "My rush call was so urgent"? A. I am reasonably sure he used the word "rush (182) call". He may have not used the word "urgent". He may have had his own word for that.

Q. Now, Mr. Hohman, when you went over there to the hospital to take his statement, had you made an investigation to determine what happened out there? A. I took his statement on the eighteenth and the accident happened on the seventh. I had a pretty good understanding of what had taken place before I went to the hospital.

Q. And you have been trained, Mr. Hohman, to take statements which would determine whether or not the company was or was not responsible for accidents? A. I have been trained to take statements as the man gives them to me and as accurately as I know how, so our legal department may fairly know the circumstances, to know what the man claims has happened.

Q. All right. Now, going back to what you had learned prior to the time that you called on Mr. Ringhiser at the hospital, did you ascertain that he was in a gondola car? A. Yes, sir. We know he had been in a gondola car.

Q. Did you know there was a box car attached to that gondola car? A. I am going to have to say I don't recall. I did know the circumstances. This is five years ago.

Q. And you haven't refreshed your memory through a file you have compiled on this accident before testifying? (183) A. I went over the statement I obtained from Mr. Ringhiser.

Mr. Rector: May I suggest to the court, under the federal rule Mr. Hohman was called here only to explain the circumstances of the taking of the statement. I don't have any particular objection to the gentleman pursuing—

Mr. Dombey: I am about to get back to the statement.

Mr. Rector: Just a minute. Will you, Mr. Dombey, please?—No particular objection, except I hate to see the thing prolonged. But he should confine his examination to the examination in chief.

The Court: I think he may question with reference to anything with reference to the taking of the statement.

Mr. Rector: Oh, certainly, sir.

Q. Now, you say you have no recollection of any boxcar being tied onto that gondola car? A. I don't recall how many cars were in the string. I do recall that he sustained his injury in a gondola car.

Q. Do you recall from which direction those cars came that collided with this gondola car?

The Court: Just a minute, please. Now you are asking him before he went to take the statement; is that correct?

(184) Mr. Dombey: That's right, which I am going back to the statement on. That is the sole purpose of this inquiry.

The Court: All right.

A. My sole recollection of that is from the statement I just read here, and that statement says that the cars came in from the west.

Q. West. Now you said in this statement, "I don't believe the yard switch crew knew or had reason to believe I was inside that car." You got that in there, haven't you? A. Yes, sir.

Q. You knew he was in the gondola car when he was injured; is that right?

The Court: I don't believe that question is clear. It isn't to me.

A. No.

Q. Did you know at the time you took this statement that he was in the gondola car? A. I know his injury had occurred in a gondola car.

Q. And you knew he was getting relief in the gondola car? A. Yes, we had the benefit of that information.

Q. So you knew when you got this statement that (185) he could not have known whether anybody saw him get in or not? A. I wasn't there to put in words of my own or any preconceived conclusion into this statement. I went there and asked Mr. Ringhiser to tell me in his own words what happened and I put down what he said. He could have said the moon was made of purple cheese and I would have put that down.

Q. The matter of him using any words to that effect, you would supply the language for it? A. Only when his words were not in good English when there was more expressive words to use, I changed.

Q. Or that better conveyed your idea? A. No. That better conveyed the story.

Q. Now, you also put in the statement, "I certainly do not feel that the yard crew was careless in any manner in making this move", didn't you? A. Mr. Ringhiser volunteered that information, and he was very positive in his feeling. He did not blame the boys at the yard one bit for what happened to him.

Q. And he used the word "careless"? A. I asked him whether he felt the yard crew was careless in any way and he said, "No, sir".

Q. When you asked him that question, Mr. Hohman, you knew he was in a gondola car and never saw the car or how (186) those cars were put in that track, didn't you? A. I had no idea what Mr. Ringhiser saw or did not see. I was there to ask him. I did know he was in a gondola car.

Q. You know you can't see through the sides of a gondola car when you are stooped in it? You know that, don't you?

The Court: That is argumentative.

Mr. Dombey: That is cross examination, Your Honor.

The Court: Well, it is still argumentative.

Q. And he did say in there, you say, that the car did not move over a foot? A. That is in the statement. That is what Mr. Ringhiser told me.

Q. And Mr. Ringhiser had no way of knowing when he allegedly said this to you, whether anyone had a right or did not have a right to put cars in track number 8, did he?

Mr. Rector: I object.

The Court: Sustain the objection.

Mr. Dombey: Exception.

Q. Now, if Mr. Ringhiser used this language, why didn't he sign it? A. He must have had his own reasons for not wanting to sign it. In any event, he did not want to sign it. (187) I did not press the issue that day. I made a further attempt two days later to get him to sign it.

Q. So you came back twice for that purpose, didn't you? A. Yes, sir. I sure did.

DEFENDANT'S EXHIBIT B.

Interview at Grant Hospital, Room 205, Columbus, Ohio, October 18, 1950.

Statement of Boyd R. Ringhiser.

I am 54 years of age, divorced, no dependent children, but I have two grown boys, and live at Route #2, Carroll, Ohio. I am employed by the Railway Company as road engineer, in service since August 10, 1917 or 1918.

On October 7, 1950 I was on duty as engineer of Extra 3028 West, called for 4:45 P.M., on duty at 4:15 P. M., and at about 5:30 P. M., while in the cab of my engine I felt a rush call to make a bowel movement come on me, so I got down off my engine and walked over from my engine on No. 12 track, Parsons Yard, to a low side gondola car standing on either No. 7 or No. 8 track, climbed up into the west end of that gon and found an open area at the west end of that car not covered with steel slabs, so I squatted down with my feet on the bed of the car, and I had just relieved myself when I heard another car approaching from the west, and I realized that it might be

moving on the track I was on, so I promptly stood up & tried to get my both feet in the clear of the steel slabs in the car. I got my left foot back far enough in the clear of the slabs, but did not get my right foot back far enough, and the car I had heard approaching continued rolling until it struck against another car which was coupled to the west end of the car I was in, the impact caused the slabs of steel in the gon to shift to the west and to catch my right foot, shove the foot against end of car, and the slabs then shifted back to the east and freed my foot. I got up on the steel slabs, threw my suspenders over my shoulder, went over to the corner of the car nearest my engine & called to my engine for help. My fireman, Sheppard, was the first man to me. I was removed from the car, taken on caboose to an ambulance & brought to Grant Hospital where I am still confined under the care of Dr. H. A. Baldwin. My right leg, above the ankle, was amputated some days later.

When I boarded the low side gon it was the easternmost of two cars coupled together, and the gon was just about straight across from the cab of my engine. The front end of my engine was right close to No. 12 switch. No. 12 track leads off of No. 11 track. It was a clear day & still good daylight at time of accident. I had not told my fireman or anyone else that I was going over into the gondola car. Our helper engine was coupled to the front end of my engine at time of accident, and we were awaiting our air test prior to departure for Walbridge. We had coupled the two engines together on the ready track at the roundhouse. No one knew I was inside the gon. I do not believe the yard switching crew knew or had reason to believe I was inside that car. Although I heard the car coming in on me from the west, I did not see that car

because of the car to the west of the gon. The car was not coming in very fast because the impact or "hit" was not very hard. This impact was not anyways near as hard as a normal switching impact usually made by a yard crew. I certainly do not feel that the yard crew was careless in any manner in making this move. This was a very easy impact and the two standing cars did not move over a foot at the most. While I do not know whether the hand brakes were set on the two standing cars, I do not think the hand brakes were set. I feel that the yard crew had a perfect right to make the move they made in the track in question without first finding out whether I or anyone else was in one of the cars. Before I left home I had a small bowel movement, but I did not think the amount was sufficient so I took a little dose of salts and chased it down with about 3 or 4 swallows from a jug of sweet cider. After arrival at Roundhouse Washroom my bowels moved again about 15 or 20 minutes before time to get on my engine. After boarding my engine I could still feel the effects of my physic. When I left my engine to go to the gondola I had to get some place quick to relieve myself because I knew I would have a bowel movement at any moment. The nearest toilet to my engine was one on the other side of the coal bunk, but I would have had to cross over two trains or more to get there; and there is another toilet to the south but I would have had to cross several trains and tracks being switched to get there. My rush call was so urgent that I was lucky to be able to make it to the gondola car in time.

I generally weigh around 210 pounds, am about 5′ 7 or 8 inches tall. Prior to this accident I had no physical impairments and my legs and feet were entirely normal.

My rate of pay varies according to the class of engine and class of service, and my pay usually averages around $225.00 per half after deductions.

(Sgd) .....

Witness: .....

The above is a typewritten copy of the handwritten statement obtained from Boyd R. Ringhiser by District Claim Agent R. H. Hohman at Grant Hospital on October 18, 1950. On that date Engineer Ringhiser declined to read or affirm that statement. On October 20, 1950 Engineer Ringhiser did read the above typewritten statement, said it was correct with the exception of the word "caboose" on the first page, which he crossed out by pencil, but he declined to sign the statement.

Witness: R. H. Hohman.

DEFENDANT'S EXHIBIT C.

Investigation held in Grant Hospital, Columbus, Ohio, 2:30 p. m., November 13, 1950, in connection with injury sustained by Boyd R. Ringhiser, October 7, 1950, at Parsons Terminal.

Members Of The Board: Mr. R. B. Holt, Road Foreman of Engines, Mr. Wade Louks, Trainmaster.

Statement of Boyd R. Ringhiser, Engineer, Age 54, 32 years service.

Q. You state clearly just how this occurred.

A. I was called to go to work, I went to the toilet, my bowels didn't move to suit me, I goes back in the house and takes a teaspoon of salts, after I had taken the salts I took about three swallows of sweet cider and gets in the car, goes to Parsons Terminal.

When I got to Parsons Terminal my bowels moved very freely; changed clothes, went over and got on my engine,

left the ready track, backed our engines back in No. 12 on the train. Just in the act of setting up the air felt as though my bowels would have to move pretty quick. Train pulled in the east bound and couldn't get to the toilet on that side, 2 trains setting on the westbound would have had to crawl over to get to the toilet on the north side of the tracks, got off my engine, went over and crawled in a gondola car (about 3 tracks over north) and this car was loaded with steel. I takes my trousers down, set down in the end of the car and stooled out. There was another box car next to the lead up against the gondola. I heard another car coming, got up and it hit, shifted the steel, caught my foot between the end of the steel and the end of the gondola car, mashed it, then shifted back and loosened me. I crawled across the steel to the corner of the car, got up on it and called for help, my fireman and the engineer on helper engine come over, lifted me down, carried me over in front of the terminal building. When they got me over there the ambulance was there, put me in it, brought me to the Grant Hospital, put me under ether. I don't know what happened then.

Q. What doctor attended you at Grant Hospital?

A. Dr. Baldwin is the only one that touched me since I've been here.

Q. What was the impact of the car that struck the cars that you were in at the time of the bowel movement?

A. Now that would be pretty hard for me to say. Just about the usual coupling. The car only moved about 25 ft.

Q. You say there were only two cars came in there that this car came in and hit?

A. That is correct.

Q. Did anyone see or know that you were in the car?

A. No.

Q. Did any member of your own crew know that you were going to leave your engine?

A. No member of my crew knew that I was leaving as the fireman was down looking at the ashpan.

Q. Did you have any conversation with any of the ground crew?

A. Didn't have no conversation with anybody.

Q. What time were you called for?

A. I was called for 4:45 p. m., on duty at 4:15 p. m.

Q. With relation to location of car in which you were injured, where are the toilet facilities located?

A. There is one about 400 or 500 ft. south from where my engine set, but I couldn't get to it account pulling in and out and yard crew switching. There was another one over at the terminal building, but that was out of the question, I couldn't have got that far. There was another one located north of the main tracks on which there were two trains standing and I couldn't have got there account having to climb over two trains.

Q. Can you say if there was any mishandling of the switching or anyone at fault for the accident?

A. No. They did not kick the cars in there hard enough to hurt anything and they were not to blame.

Q. What was the weather?

A. Clear and daylight.

Q. Was the helper engine coupled on your engine?

A. They were coupled together and the air hose was coupled up before we left the ready track at the roundhouse.

Q. Do you recall whether or not your engine was in the clear in No. 12 track?

A. My engine was, but the helper engine was not. It fouled that lead.

Q. Do you recall your engine number?

A. 3028.

Q. How old are you?

A. I'll be 55 years old December 21.

Q. What is your address?

A. Carroll, Ohio, Route 2.

Q. How did you board this gondola car?

A. I climbed up the ladder at the corner of it.

Q. Is there anything else you want to put in there?

A. There isn't anything else.

Q. Did you have any warning at all that the cars were being kicked down in the track onto the car that you were in?

A. No.

Q. Could you sort of give us a description of your injury?

A. It was mashed between the end of my toes and ankle. My big toe was partly cut off (back about three inches), they took the big toe off, three days later they took the leg off. It is there to be seen.

Q. Do you remember whether the whole load shifted in the car or part of it?

A. The only thing I know is the one piece shifted and that's the one that caught my foot.

Q. Were you standing up in the car at the time of the accident?

A. Yes. I was standing up at the time and I heard a car coming, but I didn't know whether it was coming in this track or not.

Q. Is there anything else you want to say?

A. Nothing else to say that I know anything about.

Martha Ruoff—Stenographer.

DECISIONS PER CURIAM AND ORDERS JUNE 10 THROUGH JULY 11, 1957.

JUNE 10, 1957.

Decisions Per Curiam.

No. 844. RINGHISER *v.* CHESAPEAKE & OHIO RAILWAY CO. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for certiorari is granted, and the judgment is reversed and the cause is remanded. The trial judge set aside the jury verdict for the petitioner because, *inter alia*, it was held that the respondent "had no duty to anticipate that a car was being used for such a purpose." There was evidence, however, as the trial court found, that to respondent's knowledge employees used gondola cars for the purpose. In that circumstance there were probative facts from which the jury could find that respondent was or should have been aware of conditions which created a likelihood that the petitioner would suffer just such an injury as he did. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; cf. *Wilkerson* v. *McCarthy*, 336 U. S. 53. *C. Richard Grieser* for petitioner. *Richard T. Rector* for respondent. Reported below: 241 F. 2d 416.

MR. JUSTICE FRANKFURTER is of the opinion that the writ of certiorari should not be granted. Since the writ has been granted, he would dismiss it as improvidently granted for the reasons set forth in his opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524.

MR. JUSTICE CLARK, dissenting.

As MR. JUSTICE DOUGLAS said in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 68 (1949), "The liability which [the FELA] imposed was the liability for negligence." Believing that the Congress was looking to the courts to

see that the railroads were held to strict accountability under the Federal Employers' Liability Act [1] for any negligence whatever resulting in injury to an employee, the Court has taken cases that in ordinary course it would have denied as involving only particular facts rather than questions "of importance to the public," *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923). As in the seamen's Jones Act [2] cases, the Court feels a duty under this Federal Act to examine each case to make certain that its mandate is honored.[3] There has been no breach in this policy since its establishment soon after the amendment of the Act in 1939. In my opinion, however, the judgment today goes beyond the most generous interpretation that may be given to the Act. The petitioner suffered the grievous injury which resulted in the loss of a leg while using, as a toilet, one of the railroad's cars standing on a switch track. While petitioner was "answering his call of nature" in the car, it moved slightly from a contact with two other cars that were being switched. This contact caused some steel plates in the car to shift, crushing petitioner's right leg.

The Court does not find a failure on the part of the railroad to provide a safe place for the petitioner to work insofar as toilet facilities are concerned. The railroad thus is not found negligent in this respect. But the Court seizes upon a statement in the trial judge's memorandum that "There is evidence that employees sometimes used gondola cars in lieu of toilets. The Court must assume

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[1] 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

[2] 41 Stat. 1007, 46 U. S. C. § 688 *et seq.*

[3] Since the October Term 1949 there have been some 17 cases, including 8 this Term, involving the sufficiency of the evidence under the Federal Employers' Liability Act. In 15 of these cases we of the majority, recognizing the responsibility that the Congress has placed on us to enforce the purpose of the Act, entered judgment for the injured employee.

that this was known to the defendant." The trial judge found, however, that the railroad could not anticipate that this particular gondola car would be used for that purpose because it was loaded with freight—steel plates—and was standing on a track that was being used for normal switching operations. The judge points out that petitioner himself thought that the car was empty when he climbed into it. If the car had not been loaded the petitioner would not have suffered the injury which resulted. For these reasons the trial judge found that the railroad could not anticipate that its employee would so use a loaded car or that the resultant injury would occur. In addition, the petitioner had admitted that he "certainly [did] not feel that the yard crew was careless in any manner . . . . This was a very easy impact and the two standing cars did not move over a foot at the most."

In the light of such a record it appears to me that negligence could not be imputed to the railroad. Of course, if the majority is saying that the railroad must inspect every loaded car awaiting switching, lest an employee be using it as a toilet, then I could easily understand the action here. But this it does not say, for it would be not only an unrealistic but an untenable burden to place on the railroad. The Court cites two cases, neither of which appears to me to be apposite. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 502 (1957), "petitioner was supplied with a crude hand torch and was instructed to burn off the weeds and vegetation along [the railroad's track]." The mishap occurred while he was performing these services. There was a "likelihood that petitioner . . . would suffer just such an injury as he did." *Id.*, at 504. In *Wilkerson* v. *McCarthy*, *supra*, the railroad had constructed a pit in its yards for the repair of car wheels. It was 40 feet long, 11 feet deep, and over 4 feet wide and was under a series of 3 or more railroad tracks. A permanent board about 22 inches wide was constructed

across the pit and was used by the employees of the railroad to walk across it. While there was a chain placed around a portion of the pit it was not sufficient to stop employees from using the board for crossing purposes. An employee slipped on the board which was greasy and oily and was injured by a fall to the bottom of the pit. There was thus a very hazardous practice which, a jury might find, the railroad took inadequate precautions to prohibit. The railroad was held responsible. The practice here may be unsanitary, but it is not foreseeably hazardous. This accident resulted from a combination of freak circumstances rather than from actionable negligence.

While I was not on the Court when *Wilkerson* was decided, I fully agree with its holding and likewise adhere to my joining the Court in the *Rogers* case. The factual situations in those cases are far removed from the facts here. In my opinion the decision today extends the doctrine of these cases far beyond any theory of liability for negligence that the Congress intended under the Federal Employers' Liability Act.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITTAKER joins, dissenting.

The facts of this case, as summarized by District Judge Cecil, are these:

> "On October 7, 1950, Boyd R. Ringhiser, the plaintiff herein, arose in the afternoon, made preparation to report for duty at 4:45 p. m., had a bowel movement, made a mental calculation and thereby set in motion a chain of events which created a result both unusual and tragic.
>
> "The sequence of these events is as follows: The plaintiff's bowel movement was unsatisfactory; 'This won't do,' said he to himself (statement made by plaintiff at trial, but ordered stricken); he took a

dose of salts and washed it down with sweet cider; he got in his car and drove to Parson's Yard, the switching yard of the defendant, and had a bowel movement at the roundhouse. He then got on his engine and maneuvered it to track twelve, where it was coupled on to a train scheduled for Walbridge Yard at Toledo. While sitting in his engine waiting for his air brake test, he had an urgent call of nature and 'had to go quick.' He dismounted from his locomotive cab to go to a toilet a short distance west. A long train of empties passed between him and the object of his immediate attention. He could not wait for this train to pass and went to No. 8 switch track and climbed into a low-sided gondola car to answer his call of nature. While thus engaged, a yard crew switched two cars into No. 8 switch track. These cars came in contact with the car ahead of plaintiff's car and it likewise came in contact with plaintiff's car. The gondola car in which plaintiff had taken his position was loaded with steel plates and when the cars made contact the plates shifted, caught plaintiff's right leg and crushed it so that a few days later, it had to be amputated."

On these facts I do not think the accident was a reasonably foreseeable consequence of any act or omission of the railroad. I therefore dissent.